Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ELOY A. ROLE

Petitioner,

vs.

ATCO PRODUCTS INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARY

Eloy A. Role
Plaintiff *pro-se*
22 Garrison Street
Newark, NJ 07105
(862) 452-2003

QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Third Circuit abused its discretion by disregarding Petitioner's contentions to the Court of perjury and obstruction of justice by Respondent and Counsel in regard to a Default Judgment that never existed when they affirmed Petitioner was granted with it by a referee of the New Jersey Department of Labor, Wage Collection Division when Respondent assisted the hearing via telephone.

II. Whether being the N.J. Rule 4:30A an affirmative defense, it is waived if not pleaded timely and ammendments under the strictures of Federal Rule of Civil Procedure 15(d) could be subject of leeway according to the court's discretion.

III. Whether existing a Petitioner's appeal before to an administrative agency pending adjudication a state court can rule in the pending appeal and then the Court of Appeals and the District Court sustain preclusion by the N.J. Rule 4:30A.

IV. Whether a state court ruling of discharge for just cause can preclude an ADEA claim at a federal court even when considering the motive as misconduct and applying the entire controversy doctrine in a Petitioner's wage claim with the Wage Collection Division of the Department of Labor.

V. Whether the Court of Appeal abused its discretion in dismissing Petitioner's claims under 42 U.S.C. §§ 1983(3) 1985(2) and the United States Constitution.

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The opinion and order of the United States Court of Appeals for the Third Circuit is contained in Appendix A.1 and is unpublished. The opinion and order of the United States District Court District of New Jersey is contained in Appendix A.2 and is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The the following statutes relevant to the determination of the present case are set forth as follows: Federal Rules of Civil Procedure Rule 15, Rule 4:30A of the New Jersey Courts, N.J. Stat. Ann. 34:11-61, New Jersey Administrative Law and Procedure, 29 U.S.C. § 623, 42 U.S.C. §§ 1985(2) and 1985(3), Invasion of Privacy, U.S. Constitution, Amendment I.

STATEMENT OF THE CASE

Eloy A. Role, ("Role") was employed by Atco Products Inc., ("Atco") on July 16, 2000, being his position at Atco the one that belongs to a tool and die maker.

Atco wrongfully discharged Role on April 25, 2001.

Role reverted to the Unemployment Insurance of the State of New Jersey for collection of unemployment benefits. This agency denied Role benefits alleging misconduct at the work place. Role appealed the decision of the agency to New Jersey Department of Labor, ("DOL"), Board of Review where Role's appeal is still pending adjudication.

On May 14, 2001, Role filed a claim with the DOL, Division of Wage and Hour Compliance claiming the payment of an accrued vacation period. A hearing was scheduled for July 19, 2001. Role appeared *pro-se;* Atco assisted to the hearing via telephone before Silvia Farley, ("Farley ") a referee with the DOL. Farley granted Role an Award by Default, alleging Atco was absent at the hearing. Atco appealed the DOL's decision to the New Jersey Superior Court Law Division, Essex County. Atco was granted judgment in its favor on February 28, 2002.

On October 25, 2001, Role filed a claim with the U.S. Equal Employment Opportunity Commission, ("EEOC") which granted Role with a right-to sue letter dated February 28, 2002.

Role filed a claim with the U.S. District Court on May 23, 2002, alleging among other things, age and race discrimination, fraud, defamation, invasion of privacy and conspiracy.

The District Court dismissed Role's Complaint on different grounds being the main one Fed.R.Civ.P. 12(b)(6) on October 25, 2002.

Role appealed the District Court's decision to the U.S. Court of Appeals for the Third Circuit on November 20, 2002.

SUMMARY OF THE ARGUMENT

Petitioner "Role" had stated valid claims. He assisted *pro se* to the hearing set for July 19, 2001. Defendant assisted via telephone. If the decision of the DOL stated that Respondent was absent but the telephone records shows a call between the DOL and Atco the day of the hearing means that Atco assisted the hearing. Thereafter, contentions by anybody that there was a Default Judgment are to be, perjury, subordination of perjury and obstruction of justice.

Being the N.J.R. 4:30A an affirmative defense it is waived if it is not pleaded on time. Precisely what happened in the Role's case where the District Court allowed an untimely (for the reasons stated) amendment of Defendant's Answer and an inappropriate amendment and supplemental pleading to the Respondent's Answer under Rule 15(d).

According to the New Jersey Administrative Law if an appeal is before an administrative agency of the State no court has jurisdiction on the pending appeal while on appeal, this tells the Courts which ruled on the Petitioner's case invoking preclusion under N.J. R. 4:30A they abused their discretion. The rulings of the federal courts also contravened the Erie doctrine in this regard.

Assuming arguendo in the employer allegations of Petitioner's "misconduct" on the grounds of an unproved and unsupported charge of negligence against Petitioner's, (when the employer itself mounted a die stripper purposely backwards as a pretext to fire

Petitioner) if there were no damages to the employer and the charge of misconduct could have room, Plaintiff was still able to raise a claim for age and race discrimination.

While the District Court and the Court of Appeals interposed legally tailored technicalities and unsupported naked and bald assertions regarding Petitioner's contentions of conspiracy and invasion of privacy, Petitioner's furnished the Courts with material, substantial and conclusive evidence about the charges.

Because Petitioner's Complaint is before this Court on 12(b)(6) motions, it should be reviewed in the light most favorable to him. Mr. Role has sufficiently alleged violations of the employer while he shared an employment relationship with him, and he is entitled to have a day in court.

I

Respondent and its Counsel knew Atco assisted the hearing via telephone, held on July 19, 2001, at the N.J. DOL, Wage Collection Division. Petitioner pleaded false pleadings by Atco at the District Court and Court of Appeals. Both Courts abused their discretion by disregarding Petitioner's contentions.

Petitioner filed a motion asking the District Court to disbar Atco's Counsel

on the grounds of frivolous pleadings interposed by Atco's Counsel in connection with N.J. R. 4:30A. Petitioner averred that his Complaint could not be barred by the Rule above mentioned. The District Court denied Petitioner's motion on September 9, 2002.

A pre-motion conference for sure would have cast light on the issue. Yet, no such conference was held. Then at the Court of Appeals, Counsel for Atco went further on the grounds of the latitude granted to him by the District Court and averred in his Brief on Behalf of Appellee that Atco **inadvertently** failed to appear at the hearing. See Appendix F, p. 2, ¶ 2. Petitioner in his Reply Brief of Appellant told the Court of Appeals that Counsel for Atco "(h)as drifted this Court into the stream of deceit. . .". See Appendix G, p. 9, ¶ 1. In the context of Petitioner's Reply Brief like in the present context, deceit means perjury and obstruction of justice on the grounds of 28 U.S.C. § 1746 Unsworn declaration under penalty of perjury, Dikinson v. Wainwright, C.A.5 (Fla) 1980, 626 F.2d 1184 is concurrent with the case at hand. "(o)ne who subscribes to a false statement under penalty of perjury pursuant to this section my be charged with perjury under section 1621 of Title 18, just as if the statement were made under oath."

Furthermore, following Mainelli v. Providence Journal Co., D.C.R.I.1962, 207 F.Supp. 453, affirmed in part vacated in part on other grounds 312 F.2d 3., where it was said, "(I)t must have been cause of action which existed under or was created by state law and over which

federal district court had no jurisdiction . . . " In parallel concomitance with 18 U.S.C. 1501 et seq.

This is Petitioner's case. Petitioner on July 19, 2001 was sat in a chair in front of the N.J. DOL's referee Silvia Farley. Farley kept on leaving the room to talk to Atco over the telephone and coming back to talk with Petitioner according to what Atco said or did not say. This situation repeated over and over again for a period of two hours.

Assertions by Respondent or anybody else that on July 19, 2001 there was a Default Judgment in favor of the Petitioner in this action constitutes perjury and obstruction of justice and it is in this foundation that Petitioner's case existed and was moved; namely the quick sands of collusion and deceit. See Appendix D.

II

Being the New Jersey Court Rule 4:30A an affirmative defense, it is waived when not pleaded timely. Federal Rule of Civil Procedure 15(d) is subjected to unambiguous language regarding its application.

Respondent never filed a motion for leave of court, as the Rules compelled, to amend its Answer under Federal Rule of Civil Procedure 15(d). Respondent interposed a new cause of action when it invoked N.J. R. 4:30A. Preclusion under the above mentioned Rule is an affirmative defense and it is waived if it is untimely pleaded. The Petitioner's

controlling case, Kopin v. Orange Products Inc., 297 N.J. Super. 353, 375 (App. Div.) cetf. den. 149 N.J. 409 (1977), see also Aikens v. Schmidt, 329 N.J. Super. 335 (App. Div. 2000) (defendant waived entire controversy doctrine by not raising it until plaintiff rested).

According to Respondent N.J. Rule 4:30A appeared in the case at bar in the interim that started when Respondent filed its Answer and ended when Respondent thought the N.J. R. 4:30A could be applied. What procedurally speaking Respondent filed was a plain amendment under Rule 15(d) having full complacency from the District Court to circumvent the Rule. Summarizing, in this particular case N.J. R. 4:30A is the transaction that appeared after Respondent filed its original Answer which is, needless to state, preposterous.

III

> According to the New Jersey Administrative Law, if there is an appeal before a State agency pending adjudication, no court has jurisdiction over the subject matter on appeal.

The District Court as well as the Court of Appeal sustained that being an appeal pending adjudication before the N.J DOL Board of Review under the proviso of N.J. Stat. Ann. 43:21-6(e) **Board of Review,** See Appendix C, then Law Division of the N.J. Supreme Court, Essex County had jurisdiction to determine that

Petitioner was discharged for cause from Atco and in a bundle to hear all the pending claims of Petitioner's Complaint. Such a position of the Courts' is anachronistic and illogical. It was stated in Heulitt v. Board of Review, Dept. of Labor, 300 N.J. Super. 407, 693 A2d 155 (A.D. 1997)
"(A)ppeal to the Board of Review removes claim in its entirety and confer upon Board complete review powers. . . "

In addition, Town of Kearny, Plaintiff-Respondent v. Hackensack Meadowlands Development Commission and Alan J. Steinberg, Executive Director, Defendants-Appellants, 344 N.J. Super. 55 at [2] "(a) plaintiff may not seek relief in the trial court when the Legislature has vested exclusive primary jurisdiction in an agency. *Abbot v. Burke, 100 N.J. 269, 297, 495 A2d. 376 (1985)*, the last reasoning on the behalf of the Plaintiff based on the New Jersey Administrative Law.

The Erie doctrine on the other hand tells both Federal Courts that ruled in the Petitioner's case that the State of New Jersey has it own laws and rules to deal with the Petitioner's subject matter of his litigation regarding joinder of claims and when and how to apply them.

It is not the time for assumptions but if it were, considering that in the Petitioner's case there was a Default Judgment from the N.J. DOL, Wage Collection Division and the N.J. R. 4:30A could be applied to Petitioner's pending appeal before the N.J. DOL, Board of Review, stripped the Law Division of the Supreme Court of the State of New Jersey of any jurisdiction to rule in the Petitioner's pending

claims at different forum(s) at the day of the hearing of Respondent's appeal of a case heard at the N.J. DOL Wage Collection Division, Role v. Atco Products, Inc. on an accrued unpaid vacation period. See Appendix E.

There are abundant cases that elaborate on the issue of the New Jersey Administrative Law; just to cite, MCI Telecommunications Corp. v. Teleconcepts, Inc., 519 U.S. 815, 136 L.ED2d 25 where it was said, "(I)n contrast with legislature provides agency with exclusive primary jurisdiction, it preempts court's original jurisdiction over the subject matter. . . " In parallel concomitance with the N.J. DOL's Board of Review in the Petitioner's case.

The policies of the N.J. DOL are that the Board of Review's decisions are subject of appeal at the Apellate Division of the Courts of the State of New Jersey.

Finally, in Prenger v. Moody, 845 S. W. 2d 68 (Mo.App. W.D. 1992) at 73 the holding was:

> "The decision of the PAB is reviewed as it had been appealed directly appealed to this court. (citations omitted). Review of evidence is done in the light most favorable to the agency's decision. (citations omitted). A reviewing court does not consider the matter as an original proposition, but "must differ to the finding of fact of the administrative tribunal. A court where district or appellate is not permitted to substitute its

judgment for that of the PAB.

It is seen how courts preserve administrative agencies' primary jurisdiction.

IV

A state court ruling of discharge for cause can not preempt claims of age discrimination even when considering the motive as misconduct and applying the entire controversy doctrine in a Petitioner's wage claim with the Wage Collection Division of the of the Department of Labor.

The Court of appeals for the Second circit in deciding Owens v. New York City Housing Authority, 934 F2d 405 (2d Cir), *cert denied* 112 S. Ct. 431 (1991) took a definite position regarding the collateral estoppel issue. *A finding of misconduct arising out of a proceeding under the state civil service law dealing with Owens's discharge on disciplinary grounds was deemed not to preclude Owens from establishing a prima facie ADEA claim.* A portion of that claim which entailed the Plaintiff establishing that she was qualified for the position from which she was discharged. The court reasoned that "[a]n individual may well have the ability to perform the job duties, even if her conduct on the job is inappropriate or offensive." With regard to the question whether the state court proceedings erected a res judicata barrier to the plaintiff's ADEA claim,

the court reasoned that the state court "was not empowered to address Owens' claims of discrimination or retaliation...[and so those] claims...[were] not barred.

In the case at bar, Petitioner's replacement was a person 20 years younger than him, Jose Pitta, a man of Portuguese nationality; ADEA does not limit plaintiff's proof to direct replacement by a younger person. plaintiff needs only to show that he was "ultimately" replaced by a such person. See Sorba v. Pennsylvania Drilling Co., Inc., 484 U.S. 1019 (1988). The age of the replacements shows Respondent's motive.

Kopin v. Orange Products, Inc., 688 A.2d 130 (N.J. Super. A.D. 1997), must be read as the Petitioner's controlling case where at 141, [22] it was stated by the State Court:

> "Here we hold that the entire controversy doctrine should not apply to bar plaintiff's *quantum meruit* claim simply because plaintiff had previously filed a wage claim with the Wage Collection Division of the Department of Labor pursuant N.J.S.A. 34:11 57 *et seq.* While the *quantum meruit* may fall within the broad definition of wages set forth in N.S.S.A. 34:11 57, plaintiff would not have had a fair and reasonable opportunity to fully litigate such a claim against defendant in the Department of Labor.

> The jurisdiction limit of wage claim in such proceeding is $10,000. *See* *N.J.S.A.* 34:11:58. In the present matter, plaintiff is seeking damages excess of $10,000. . . "

Furthermore, at 141, [23-26] the Court discoursed the matter of untimely amendments made by defendant like in the present case. In The Kopin Court like in Role's case, if Respondent is favored with the entire controversy doctrine it must still renounce to an untimely ammended Answer. It is seen that the controlling case mirrors the Petitioner's one. The Court emphasized on the fact that the entire controversy doctrine is an affirmative defense. The Kopin Court set forth: "(d)efendant did not raise the entire controversy doctrine defense in its answer to plaintiff's amended complaint. . . "

In reviewing Jones v. Holvey 29 F.3d 828 (3rd.Circ. 1994), (this is Petitioner's federal controlling case), the Court set forth at 831:

> "[H)]owever, under the entire doctrine, a party will not be barred from raising claims that he could not have brought in the initial action. As the New Jersey Supreme Court has stated, if the court in the first action would clearly not have jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground

should not be precluded. . . "

It appears according to The Jones Court that if the State Court had known Petitioner's had a case pending adjudication at the N.J.DOL's Board of Review on the employer's charge of "misconduct at the work place", the State Court would have declined to exercise jurisdiction to hear Petitioner's claims under the ADEA and additional claims, federal and state ones, in order not to deprive the administrative agency of its **primary jurisdiction** granted to it by the Legislature.

Also at 831, The Jones Court elaborated on which it called "[t]he leading case applying this Rule in the context of an appeal of an administrative decision is Pascucci v. Vagott, 71 N.J. 40 362 A2d 566 (1976). . . " Here the Jones Court implied that in the event that the administrative agency produced an adverse decision to a party, then the party could appeal to the Appellate Division of the State Courts.

The Jones Court together with the administrative law of the State of New Jersey set forth that the Law Division of the New Jersey Supreme Court **only** had jurisdiction to hear Role's Wage Claim.

V

Petitioner's discharge obeyed to fabrication and invidiously discriminatory class based animus. Plaintiff's right to privacy was violated by the

employer when it disclosed his personal records and documents.

Among others reasons interposed by the District Court and Court of Appeals to dismiss Petitioner's 42 §§ 1985(2) and 1985(3) claims as well as claims under the U.S. Constitution the main ones stand for a lack of specificity in the Petitioner's pleadings. Both Courts in their opinions discursed emphazing in a phrase, **lack of merits.** On the other hand, in the Petitioner's Complaint, he pleaded specifically of conspiracy and invasion of privacy; furnishing, which is relevant and incontestable, conclusive and substancial evidence in his cross-motion opposing Respondent's motion to dismiss. This is precisely what distinguished the Courts' bald and unsupported arguments when confronted with what the Petitioner brought over to the Courts to sustain his claims. Petitioner's citation of The Lattany Court, Lattany v. Four Unknown U.S. Marshals, 645 F. Supp. 262 (E.D. Pa. 1994) at 264 released him of the obligation of **naming** the conspirators by name in his Complaint filed with the District Court. Petitioner asserted that Atco fabricated his discharge in order to fabricate evidence that could help defendants in a case Petitioner was litigating in the U.S. District Court E.D.N.Y.. While Petitioner planted this assertion, Atco never rehabilitated or fought the charges. Atco interposed something that under no circumstance could be interposed, it reverted to frivolous pleadings surfing in the wave of the New Jersey's entire contoversy doctrine. For instance, to the charge

Atco of "misconduct" at the work place against Petitioner, made at the New Jersey Department of Labor, Unemployment Insurance where Petitioner was disqualified for benefits, there is still an appeal before the N.J. DOL's Board of Review **"frozen and undecided"**.

See Appendix C, *(this is the smoking gun.)*

In the Petitioner's appeal before the Board of Review there was discovery and depositions. Petitioner charged Atco of being responsible for the assembly of a die stripper backwards in order to fabricate Petitioner's discharge, which constitutes a conspirancy under §§ 1985(2)(3). Not only did the Petitioner charge Atco, but also produced conclusive and substantial evidence to sustain the charges.

Returning to the Petitioner's Appeal at the U.S. Court of Appeals for the Third Circuit and Petitioner's submissions to the District Court. Petitioner set forth in connection with his claim of conspiracy as follows:

1. Respondent knew Petitioner had an accident while working in the State of New York. See Appendix I.

2. Petitioner, at the time he was hired by Atco, denied he had ever filed a Workers Compensation claim. See Appendix H.

3. Respondent denounced Petitioner to the Interestate Unit on May 11, 2001 asserting Petitioner may have been collecting ***disability benefits*** while

working for Atco 15 days after Petitioner was discharged. See Appendix I.

4. The assertions by Respondent before the Interestate Unit matched what Petitioner was asked in a production of documents under Fed. R. Civ. P. 34. See Appendix J.

5. Petitioner's appeal before the N.J. DOL's Board of Review deals with ***fabrication of evidence.***

This is the evidence Petitioner furnished to the Court of Appeals and District Court in connection with his 42 U.S.C. § 1985(2) claim. Additionally Petitioner added:

1. Petitioner's charges with the EEOC are based in race and age.

2. Petitioner is a member of a protected class, a Hispanic.

3. Respondent in a class-based discriminatory animus, conspired with Counsel for Petitioner's former employer in his lawsuit before the U.S. District Court E.D.N.Y. in Case No. CV 00 4781 (DHR)/(ETB) because Petitioner was ***attending*** federal proceedings in a civil lawsuit against his former employer and unions.

In connection with Petitioner's 42 U.S.C. § 1985(3) claim Petitioner furnished the Court of Appeals and District Court with the following:

1. Petitioner's charges with the EEOC

are based in race and age.

2. Petitioner is a member of a protected class, an Hispanic.

3. Respondent in a class-based discriminatory animus, conspired with Counsel for Petitioner's former employer in his lawsuit before the U.S. District Court E.D.N.Y. in Case No. CV 00 4781 (DHR)/(ETB) to deprive Petitioner of his rights to work discharging him in order to produce illegal evidence.

It is an indisputable fact that Counsels for Defendants in the Plaintiff's New York lawsuit contacted Atco. Petitioner's assertions are not figments of his imagination. It was asserted on January 28, 2003 by Counsels for Defendants in a pre-motion conference carried out at the District Court E.D.N.Y. that day.

Petitioner knew Plaintiff had an accident while working in New York through Petitioner's former employer in New York. Respondent waited 15 days to denounce Petitioner' after his discharge when Respondent had enough time to do so which points out to the fact Respondent engaged in a conspiracy against Petitioner, the "untimely" denounce against Plaintiff by Atco's talks by itself.

Petitioner's case mirrors Britt v. Suckle 453 F.Supp 987, where it was said at 991:

> "Claiming to be a victim of conspiracy, plaintiff here seeks to defeat the alleged scheme under the federal prohibition against

conspiracies to obstruct the due course of justice. This court concludes that as alleged, defendants' acts constitutes a violation of 42 U.S.C. § 1985(2)".

Britt as well as Role were chased in every job they had by conunsels for their defendants and the defendants themselves with the object of looking for dirt, fabricating evidence and ultimately their discharge.

In the case of Role Counsels for their Defendants contacted two employers while Role was working with them, (this assetion is documented), Rosville Tool and Die, Livingston New Jersey and Atco Products, Inc., Newark, New Jersey. There is a third one where discovery will place defendants and their counsels on the spot.

Carchman v. Korman Corp. 456 F.Supp. 730 (1978) expands the Plaintiff's assertions at 737 the, "[I]nvidiously discriminatory class based animus in all likelehood includes a conspiracy directed ***inter alia***, against racial, religious and gender-based classes of aliens, undoubtedly some, if not all ethnic classes, as well as recent additions such as the class of aged persons (protected by ADEA, 29 U.S.C. § 621 *et seq.*" (citatios omitted), which "is" the Petitioner's class.

In Kimble v. D. J. McDuffy, Inc. 648 F.Supp. 340 (1981) the holding in parallel concomitance with the case presented by Petitioner to the Supreme Court was at 354:

"Accordingly, this writer stands by the panel majority's opinion. ***Griffin*** requires only an injuriously retaliatory animus, not an invidiously discriminatory animus for the conspiracy in this case. To include filing suit whithin the meaning of **"attend"** is both reasonable and practical. And it poses no danger of [federalizing] state law tort. I therefore dissent". *(emphasis added)*.

Precisely what has occurred here was that Petitioner was punished by his employers for suing them and **attending** Civil Right proceedings at a Federal Court.

The 18 U.S.C. § 241 which penalizes for conspiring to oppress or intimidate a citizen in the exercise or enjoyment of any right or privilege secured to him by the Constitution encompasses rights secured by the equal protection clause as well as by the due process clause of the Fourteen Amendment. United States v. Guest, 338 U.S. 745, 86 S.Ct. 1170.

The Court of Appeals as well as the District Court erred when they dismissed Petitioner's claim of invasion of privacy by Atco. Atco disclosed imprudently Petitioner's copy of his driver license, passport and personal data. Petitioner attached to his submission to the Courts (Appeal and District) copies of Atco's disclosures. Though reputation standing alone is not a constitutionally protected interest, when coupled with loss of employment it will involve due process. The Allison Court in Allison v. City of Live Oak, 450 F. Supp. 200 (1978) at 204,

citing Paul v. Davis, 424 U.S. 693, 702, 96 S.Ct. 1155, 47 L.ED.2d 405 (1976); the court stated that reputation when coupled with loss of employment it will invoke due process safeguards. In Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d. (1976), the Supreme Court held a a liberty interest impaired in conjunction with loss of employment only when the reasons for discharge are disclosed to the general public.

In the case at bar, Respondent before a hearing with the New Jersey Department of Labor, Appeals Examiner on charges it made against Petitioner for misconduct at the work place admitted it disclosed Petitioner's file. The hearing was held at 124 Halsey St. Newark, N.J. before J. Guardino, Appeal Examiner, *on September 10, 2001, the hearing was recorded by the DOL.*

The publicity variant of invasion of privacy making public information about the plaintiff that it would be highly offensive to a reasonable person and is not of legitimate concern to the public making public, *Restatement (Second) of Torts § 652D.* Cf. Doe v. Septa (BNA) 1519, 1955 WL 334290 (E.D. Pa.. June 2, 1995), see, e.g., Anderson v. Low Rent Hous. Comm'n, 304 N.W. 2d 239, Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962).

REASONS FOR GRANTING THE WRIT

The Court of Appeals as well as the District Court neglected and disregarded the Erie doctrine Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).

The issues arose when the Courts stated in opposition to the New Jersey Administrative Law that a state court can deprive a state agency of primary-jurisdiction. See Appendix C, Petitioner's pending appeal with the N.J. DOL's Board of Review.

Furthermore, the Courts agreed that Respondent was able to amend its answer after it filed an Answer to the Petitioner's Complaint, considering N.J. R. 4:30A is according to the State's Rule an affirmative defense that is waived if it is not pleaded in the first filed answer to a plaintiff's complaint.

The critical and most pervasive and caustic position of the Courts in the Petitioner's case is when they repudiated a leading case on the issue; on the Circuit, namely Jones v. Holvey 29 F.3d 828 (3rd Cir. 1994)., the citation is a binding precedent and most importantly an imperative one. The Courts also eroded the principle of *stare decisis* fundation of the common law.

CONCLUSION

For the reasons set fort, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Third Circuit be reversed, and Respondent's motion for judgment on the pleadings, on the grounds of an untimely motion, to dismiss under Rule 12(b)(6) be denied.

Respectfully submitted

Eloy A. Role *pro se*

UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4257

ELOY A. ROLE

Appellant

v.

ATCO PRODUCTS INC

On Appeal From The United States District Court For The Distict of New Jersey
(D.C. Civ. No. 02-cv-02485
District Judge
Honorable Dickinson R. Debevoise

Submitted Under Third Circuit LAR 34.1(a)
September 2, 2003

Before: ROTH, MacKee and AMBRO

(Filed: November 18, 2003)

OPINION

PER CURIAM

On June 16, 2000, pro se appellant ELOY

A. Role began working for Atco Products, Inc. ("Atco") as a tool and die maker. Less than a year later, on April 26, 2001, Role was discharged after he failed to assemble a tool properly. Following his discharge, Role applied for unemployment insurance. The New Jersey Department of Labor, Division of Unemployment Insurance, and the Appeal Tribunal, both determined that Role was disqualified from receiving benefits because he was discharge for negligence severe enough to constitute work-related misconduct.

Role also filed a complaint with the New jersey Department of Labor, Division of Wage and Hour Compliance, claiming that he was wrongfully discharged and that, under the terms of his employment, Atco owed him accrued vacation pay. Because Atco failed to appear at the hearing, Role was awarded default judgment. Atco appealed the decision to the Law Division of the New Jersey Superior Court. On February 28, 2002, the Superior Court dismissed Role's claim and entered judgment on behalf of Atco. The court concluded that Role was "discharged for cause" less than a year after he was hired and, thus, he forfeited any rights to accrued vacation.

In November 2001, Role filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that Atco discriminated against him on the basis of his age and race. On February 28, 2002, the EEOC dismissed the charges and issued a "righ to sue" letter. Shortly thereafter, Role filed a complaint in the United States District Court for the District of New Jersey. The District Court mindful of Role's pro se status, liberally constructed the complaint as raising: (1) an age

discrimination claim under the Age Discrimination in Employment Act ("ADEA"); (2) a hostile work environment claim under the ADEA; (3) a civil right conspiracy claim under 42 U.S.C. § 1985; (4) a claim that ATCO violated his constitutional right to privacy; (5) a state and federal law claim arising from his assertion that Atco reneged a promise to provide him with a health insurance plan, and (6) assorted state law claims, including defamation and fraud.

Atco filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). In connection with its motion, Atco sought leave to amend its answer to assert the affirmative defenses of issue and claim preclusion and res judicata. Because Atco had filed an answer, the District Court converted the motion into a motion for judgment on the pleading under Federal Rule of Civil procedure 12(c). The District Court also concluded that the documents attached to the motion were matter of public record and could thus be considered without converting the motion into one for summary judgment. See, e.g., Pension Benefit Guar. Corp., v. White Consol. Indus., Inc., 998 F.2d 1192, 1197 (3d Cir. 1993)(explaining that exceptions to the general rule of conversion have been made where the materials considered at the dismissal stage are public records). Role filed a cross-motion for judgment on the pleadings and attached numerous documents in support of his position. By opinion and order entered October 25, 2002, the District Court granted defendant's motion for leave to amend its answer, granted defendant's motion for judgment on the pleadings with respect to Role's claims under the ADEA and the United States Constitution, and denied

Role's cross motion for judgment on the pleadings. The District Court declined to exercise jurisdiction over any state law claims under 28 U.S.C. § 1367(c). Role appeals.

As an initial matter, we conclude that the District Court erred treating Atco's motion to dismiss as a motion for judgment on the pleadings. Despite explicitly stating that it was limiting its review of the materials outside the pleadings to those submitted by Atco and deemed public records, the District Court in an effort to better understand Role's claims, also considered documents submitted by Role in support of his cross-motion. The District Court was thus required to treat Atco's motion to dismiss as one for summary judgment and provide the parties with an opportunity to present evidentiary materials to the court[1]. See Fed. R. Civ. P. 12(b); Fed. R. Civ. P. 56. However, under the facts of this case, we care confident that Role had an opportunity to present material factual disputes to the District Court and we see no need to waste judicial resources by remanding this matter to allow it to proceed further where the same materials will most certainly be submitted to oppose a properly filed summary judgment motion. See Loeb Indus., v. Sumitomo Corp., 306 F.3d 469, 479-80 (7th Cir. 2003)(a de facto conversion to

[1]The District Court should also have converted the motion to dismiss into one for summary judgment because Atco raised the affirmative defense of res judicata in its motion to dismiss, and the bar was not apparent on the face of the complaint. See Rycoline Prods., v. C & W Unlimited, 109 F.3d 883, 886 (3d Cir. 1997).

Consequently, we will review the record on appeal pursuant Rule 56. Id. at 480; see also Albright v. Virtue, F.3d 564, 569-70 (3d Cir. 2001) (reviewing the record under Rule 56 where the district court inapropriately considered the evidentiary materials submitted in support of defendants' motion to dismiss, as well as the evidentiary materials attached to plaintiff's opposition thereto).

We will affirm. We may affirm on any ground supported by the record. See Grayson v. Mayview State Hosp., 293 F.3d 103, 109 (3d cir. 2003). Role claims that the District court abused its discretion in granting Atco leave to amend its answer. We disagree, and hold that the District Court did not abuse its discretion. See Foman v. Davis, 371 U.S. 178, 182 (1962). Under Federal Rule of Civil Procedure 15(a), a responsive pleading may be amended at any time by leave of court to include an affirmative defense , and "leave shall be freely given when justice so requires" See Kleinknecht v. Gettisburg College, 989 F.2d 1360, 1374 (3d Cir, 1993). Leave to amend, however, should not be granted if the opposing party will be prejudiced. Id. Role was not prejudiced. He addressed the new affirmative defense at length in his cross-motion for judgment on the pleadings, and the District Court considered his arguments before issuing its opinion and order.

With regard to Role's ADEA claim, the District Court determined that it was barred by the New Jersey entire controversy doctrine. The entire controversy doctrine is essentially New Jersey's specific, and idiosyncratic, application of traditional res judicata

principles. See Electro-Miniatures Corp. v. Wendon Co., 889 F.2d 41, 44n.5(3d Cir. 1989). Under the doctrine, all issues of a single dispute between parties must be completely determined in one action. See Culver v. Insurance Co. of N. Am., 559 A.2d 400, 406 (N.J. 1989). The District Court determined that Role could have raised his age discrimination claim before the New Jersey Superior Court when the court heard Atco's appeal of the wage Collection Division's decision regarding his vacation pay. Because we find that Role's ADEA claim lacks merits, we need not determine whether the District Court properly applied the entire controversy doctrine to bar the claim.[2]

A plaintiff establishes a prima facie case under the ADEA by showing hat (1) he was over 40 years of age, (2) he qualified for the position in question, (3) he suffered an adverse employment decision, and (4) he was replaced by a sufficiently younger person so as to create an inference of age discrimination. See Sempier v. Johnson &

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[2] We note, however, that although the District Court determined that the New Jersey Superior Court had jurisdiction over Role's ADEA claim, it failed to discuss whether the Superior Court would have exercised jurisdiction over the claim had Role tried to raise it. See Jones v. Holvey, 29 F.3d 828, 831-32 (3d Cir. 1994) (determining that a claim is not barred by the entire controversy doctrine if it is unlikely that a state court would chose to exercise jurisdiction over the claim).

Higgins, 45 F.3d 724, 728 (3d Cir. 1995). If plaintiff establishes a prima facie case, an employer must rebut the presumption of age discrimination by stating a legitimate non- discriminatory reason for the adverse employment decision. Id. The plaintiff then has the opportunity to demonstrate that the employer's proffered reason was a pretext for discrimination. Id.

There is little doubt that Role could establish a prima facie case of age discrimination. He was fifty-nine years old at the time of the discharge, had experience as a too and die maker, and was purportedly replaced by someone at least twenty years younger. Atco claimed, however, that Role was discharged for negligence in the documents filed on appeal, we conclude that Role did not, and cannot, demonstrated that Atco's proffered reason was a pretext for discrimination. See Sempier, 45 F.3d at 731 (a record is examined on appeal for evidence of inconsistencies that could support an inference that the employer did not act for the stated reason). Role thus could not establish an age discrimination claim under the ADEA.[3]

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[3] On appeal, Role claims that he was from Argentina and was also discharged because of his race. We agree the with the District court that, while Role may have referenced Title VII in his cross-motion, it did not appear that he intended to state a claim of race discrimination. To the extent that he argues on appeal that he intended to

Turning to Role's remaining federal claims, we agree with the District Court that they lack merit. First, the District Court correctly concluded that Role failed to state an age-based hostile environment claim under the ADEA. In his complaint, Role claimed that he was "biased and abused" by a co-worker on December 15, 2000, and that Atco's vice president called him a "weirdo" and "wacko". Role did not clarify, either in the District Court or on appeal, how he was biased and abused by a co-worker. In any event, the incidents were not so severe or pervasive that they altered the conditions of Role's employment. See Brennan v. Metropolitan Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999) (analysis of the hostile working environment theory of discrimination is the same under the ADEA as it is under Title VII). In addition, the record is devoid of evidence that any of Atco's employees harassed Role because of his age. Cf. Abramson v. William Paterson College of NJ, 260 F.3d 265, 279 (3d Cir. 2001) (analizing hostile work environment

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[3] (...continued)
raise such a claim, we merely that his failure to show that Atco proffered a false or pretextual non-discriminatory reason for discharging him would have likewise prevented him from establishing a claim of race discrimination under Title VII. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) (explaining the shifting burdens in employment discrimination cases).

claim based on religion under Title VII).

The civil rights conspiracy claim under 42 U.S.C. § 1985(3) likewise lacks merit. Role did not allege that the conspiracy was predicated on any class-based animus. See Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)(reach of section 1985(3) is limited to private conspiracies predicated on "racial, or perhaps otherwise class based, invidiously discriminatory animus"). Inasmuch as we have already concluded that Role's ADEA claim lacks merit, Role cannot rely upon that claim to support his section 1985(3) claim. Cf. Brown v. Phillips Morris, Inc., 250 F.3d 789, 806 (3d Cir. 2001). To the extent that Role asserted a claim under 42 U.S.C. § 1985(2), that claim also fails. Role did not allege that Atco conspired to deter him by force, intimidation, or threat from attending court or testifying freely in any pending matter. See Malley-Duff & Assocs., Inc., Crown Life Ins. Co., 792 F.2d 341, 356 (3d Cir.1986).

On appeal Role does not challenge the District Court's conclusion that his constitutional right to privacy claim failed because Atco is not a stateactor. Rather, he tries to assert a new claim under the New York Times v. Sullivan, 376 U.S. 254 (1964).

Claims that are not raised for the first time in the District Court cannot be raised for the first time on appeal. See Medical Protective Co. v Walkins, 198 F.3d 100, 105 n.5 (3d Cir. 1999); United States v. Anthony Dell'Aquilla Enters., 150 F.3d 329, 335 (3d Cir. 1998). In any

event, New York times is inapposite and does not afford Role any basis for relief.

Finally, because the federal claims over which he District Court had original jurisdiction lacked merit, and consideration of judicial economy, convenience and fairness to the parties did not provide an affirmative justification for exercising supplemental jurisdiction, the District Court did not abused its discretion in dismissing Role's state law claims under 28 U.S.C. § 1367(c). See Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995). We have considered Role's other arguments raised on appeal and find that they lack merit and warrant no further discussion.

Accordingly, we will affirm the District Court's October 25, 2002 order.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4257

ELOY A. ROLE,

Appellant

v.

ATCO PRODUCTS INC.

On Appeal From the United States District Court For the District of New Jersey
(D.C. Civ. No. 02-cv-02485)
District Judge: Honorable Dickinson R. Debevoise

Submitted Under Third Circuit LAR 34.1(a)
September 2, 2003

Before: ROTH, McKEE and AMBRO, Circuit Judges

JUDGMENT

This cause came on be heard on the record from the United States District Court for the District of New Jersey. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court enterd October 25, 2002 be, and the same is hereby affirmed. Costs taxed against

appellant.

All of the above in accordance with the Opinion of the Court.

ATTEST:

"s/ Marcia M. Waldron"

Clerk

DATED: November 18, 2003

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELOY A. ROLE, pro se,	:	
	:	
Plaintiff,	:	
	:	Civ.No.
v.	:	02-2485
	:	(DRD)
ATCO PRODUCTS, INC.,	:	
	:	OPINION
	:	
Defendant	:	
	:	

Jed L. Marcus, Esq.
Shaun C. Reid, Esq.
Grotta, Glassman, & Hoffman, P.A.
75 Livingston Avenue
Roseland, NJ 07068

Attorney for Defendant

Eloy A. Role
22 Garrison Street
Newark, NJ 07105

Pro-se

DEVEVOISE, Senior District Judge

Pro se Plaintiff Eloy A. Role a claim wrongful discharge under the Age Discrimination in Employment Act, 29 U.S.C. et seq.[1] Constructed generously and with

[1] The Complaint also invokes the Fair Labor Act. specifically 29 U.S.C. § 216(b).But given that Plaintiff does not state claims for the sort of wage and hour violation covered by the FLSA, it appears

guidance from the arguments he presents in connection with this motion, his Complaint also manifests his intent to assert several other claims under federal and state law-including claims of hostile work environment under the ADEA, and claims under 42 U.S.C. § 1985 and the United State Constitution. Defendant Atco Products, Inc., ("Atco") moves to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted and on the grounds of claim and issue preclusion. In connection with its motion Atco also requests leave to amend its Answer (principally to assert the defense of claim preclusion).

Plaintiff Role cross-moves for judgment on the pleadings under Fed. R. Civ. P. 12(c). For the reasons stated below, Atco's motion for leave to amend its Answer will be granted; its motion to dismiss the Complaint will be granted with respect to Plaintiff's claims under federal law. Plaintiff's cross-motion for judgment on the pleadings will be denied. The Court will exercise its discretion under 28 U.S.C. § 1367(c) to dismiss Plaintiff's claims under state law for lack of subject matter jurisdiction.

BACKGROUND

1. The Allegations

The Complaint purports to state a claim or claims under the ADEA; and both in the Complaint and in the supporting affidavit, Role offers some specifics allegations in support of such a claim: he

[1] (continued)

that he invokes it only because its penalities provision (§ 216) is incorporated into the enforcement provision of the ADEA , 29 U.S.C. § 626.

asserts he was dismissed by ATCO from his job in its tool and die room on April 26, 2001 and that he was replaced by a significant younger worker.[2] The Complaint and the affidavit also allege that the asserted basis for Role's dismissal, an error in mounting a "die stripper,"was erroneus.

In addition to the basic charge of wrongful dismissal under the ADEA, Plaintiff sets fort a narrative that could be constructed to indicate his intentions to state additional claims. He recounts discussions with Atco vice president in which the official allegedly undertook to consider whether to provide Plaintiff with health insurance coverage. Role contends that he was "promissed" a health plan by Atco and never provided with one, and that such plan was "extensive to the whole tool and die room but plaintiff."

Role also alleges that on or about December 15, 2001 he reported to Atco's vice-president that he has been "biased and abused" by one of his co-workers. He provides no details of the alleged abuse in the Complaint or of what bias might have motivated it.[3] He also recounts two incidents of name-calling on the part of Atco's vice-president. First, he alleges that, after Role told him that he (Role)

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[2] In the Complaint the allegation is that the replacement was 40 years younger than Role; according to the affidavit, the replacement was "about 20 years younger." The Complaint also alleges that at the time of his dismissal Role was 59 years old.

[3] In his opposition papers he names the offending employee and contends that the "incident"- apparently singular- never reported or investigated. But he still not specify the allegedly offensive conduct.

would have to sweep the men's room before using it, the official told him, "[M]ind your own business, fucking wacko." Second Role asserts that on another occasion the vice-president referred him as a "weirdo" while advising him to remove his bicycle from an entrance corridor.

The Complaint also contends that Atco "defamed" and "raised frudulent misrepresentations" regarding Role's mental and physical health, numerous aspects o his conduct on the job, and his collection of unemployment benefits while employed at Atco.[4] He further alleges that his dismissal was fabricated as part as a conspiracy with third parties, although he does not specify in the Complaint who those parties were or what the object of the conspiracy may have been.[5]

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[4] The Complaint itself does not indicate to whom the allegedly defamatory statements were communicated. It appears from documents submitted with Role's opposition papers (and from his argument in response to this motion) that statements about Role's misconduct on the job were made in connection with the assesment of his for unemployment benefits after his dismissal from Atco and in connection with the EEOC investigation of his ADEA claims. It also appears that Atco advised authorities in New York of a suspicion that Role was collecting New York unemployment benefits.

[5] Role's brief sketches a conspiracy between Atco and another former employer with which he was engaged in litigation. He suggests that his discharge from Atco was somehow part of the scheme to fabricate evidence for use in proceedings involving the former employer; and he appears to allege that Atco disclosed confidential to the former employer. It is not clear what tipe of claim this disclosure allegation is intended to support. Role argues in his brief that Atco violated his Constitutional right to privacy, and he refers to the disclosure under that heading. But the allegation of right-to-privacy violation may also

II Prior Proceedings

A review of the documents submitted by both Role and Atco reveals that this is at least the fourth set of proceedings in which issues arising from their relationship have been addressed. First, in a decision dated May 17, 2001, the New Jersey Department of Labor Division of Unemployment Insurance determined that Role was disqualified from receiving benefits arising from his discharge from Atco, finding that he had been discharged for negligence severe enough to constitute work-related misconduct. This decision was the subject of a succession of appeals and remands (involving both the Appeal Tribunal and the board of Review within the New Jersey Department f Labor). The most recent decision on the merits of Role's claim was one issued by the Appeal Tribunal on September 12, 2001, deeming him disqualified on the grounds of misconduct.[6]
The second setof proceedings, on which Atco relies for its defenses of claim and issue preclusion, was initiated
by Role's claim for accrued vacation pay, submitted to the New Jersey Department of Labor Division of Wage and Hour Compliance on May 14, 2001. As a decision

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[5](...continued)
refer to another of the Complaint's many dangling allegations, the charge that Atco installed cameras in its facilities to "check" its employees.

[6] On October 30, 2001, the Board of Review remanded the case to the Appeal Tribunal for redetermination, apparently on the ground that the recording of the proceeding bellow was inaudible. Subsequently (November 30, 2001) the Appeal Tribunal issued a decision to the effect that the it had located an audible record of the prior proceedings and was returning the case for consideration by the Board of Review. This is the

dated December 26, 2001 recounts, Role appeared pro se a the Office of Wage Collection on July 19, 2001 and testified that Atco owed him accrued vacation pay under the term of his employment. Because Atco did not appear at the hearing, Role was awarded a default judgment for vacation pay in the amount of $554.45. Atco appealed to the Law Division of the New Jersey Superior Court; and on February 28, 2002, the Law Division issued a desicion stating in full

> Plaintiff's claim is dismissed and Judgment entered on behalf of defendant, Atco Products, Inc., the court having found after testimony as facts that the Plaintiff was discharged for cause prior to June 1st 2001 and under the terms of the agreement he he forfeited any and all rights to accrued vacation.

Finally, prior to bringing this action in this Court, Role submitted a charge (dated November 19, 2001) to the EEOC, citing discrimination on the basis of age and race in connection with his employment with Atco. The EEOC provided notice of the charge to Atco on November 27, 2001 (referring only to the allegation of aged-based discrimination); and on February 28, 2002 it issued a "right-to-sue" letter, informing Role that it had been unable to conclude that the information it had obtained established a violation.

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[6](... continued)

the latest of the decisions that Role provides that relate to his unemployment insurance claim.

LEAVE TO AMEND THE ANSWER UNDER FED. R. CIV. P. 15(a)

Under Fed.R.Civ.P.15(a), a party may amend the answer to the Complaint within twenty days after it is served;after that time, amendments may be made only by leave of court or by written consent o the adverse party. In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court stated:

> [i]n absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc,- the leave sought should, as the rules require, be "freely given."

Foman, 371 U.S. at 182. The Court of Appeal has interpreted these factors "to mean that prejudice to the non-moving party is the touchstone for the denial of an amendment. In the absence of substantial or undue prejudice, denial instead may be based on bad faith or dilatory motives, true undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of the amendment." Lorenz v. CSX Corp., 1 F.3d 1406, 1413-14 (3d Cir.1989)(citations omitted). Therefore, the non-moving party "must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the

amendments been timely. Bechtel v. Robinson, 886 F.2d 644,652(3d Cir.1989)(internal quotation marks omitted).

In the present case there is nothing to indicate any prejudice to Role resulting from the amendment. Discovery has not begun; Role has not taken any substantial actions in reliance on Atco's original Answer, and his opportunity to litigate this case has not been affected by any delay. Atco's defense of claim preclusion raises purely legal issues that can be contested equally fairly at any stage of a case. It is impossible to conceive of any sense in which Role would have been significantly better off had the proposed Amended Answer been submitted sooner. Under these circumstances, leave to amend must, and shall be granted.

MOTION FOR JUDGMENT ON THE PLEADINGS

I. Applicable Standard

Atco has moved to dismiss the Complaint under Rule 12(b)(6). Because the motion has been made after Atco's responsive pleading, it must be treated as one for judgment on the pleadings pursuant to Rule 12(c). See Turbe v. Virgin Island, 938 F.2d 427, 428 (3d Cir. 1991); Borough of Sayreville v. Union Carbide Corp., 923 F.Supp. 671,675-76 (D.N.J. 1996). A motion for judgment on the pleadings will not be granted unless "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1054 (3d Cir. 1980)(citation omitted), disagreed with on other grounds

by Martin v. Wilks, 490 U.S. 755 (1989). In reviewing motion for judgment on the pleadings, a court must "view the facts presented in the pleadings and inferences to be drawn therefrom in the light most favorable to the non-moving party." Harris, 632 F.2d at 1054; Jablonsky v. Pan American Word Airways, Inc., 863 F.2d 289, 290-91 (3d Cir. 1988). Further, when reviewing a pro se complaint, a court must construe a plaintiff's factual allegations and his or her claim liberally. Neitzke v. Williams, 490 U.S. 319, 330 n.9 (1989); Haines v. Kerner, 404 U.S. 519, 520 (1972); Roman v. Jeffes, 904 F.2d 192, 197 (3d Cir. 1990).

In deciding a motion to dismiss (and by analogy a motion on the pleadings), a court may (without converting the motion to one for summary judgment) properly look beyond the complaint to matters of public record including court files, records and letters of official actions or decisions of government agencies and administrative bodies, documents referenced and incorporated in the complaint or essential to a plaintiff's claim which are attached to a defendant's motion. Rogan v. Giant Eagle, Inc., 113 F.Supp.2d 777, 781 (W.D. Pa. 2000)(citing Aritzmendi v. Lawson, 914 F. Supp. 1157, 1161 (E.D. Pa. 1996)).

II. Claims Under Federal Law

A. Wrongful Discharge under the ADEA

Role's claim of wrongful discharge under the ADEA is precluded under the New Jersey's entire controversy doctrine. Under 28 U.S.C. § 1738, federal courts give same preclusive effect to the decision of a state court as the courts

of that state would give the same decision.[7] In New Jersey, according to the entire controversy doctrine, a party is precluded from asserting claims that he or she could have asserted in a previous action arising from the same transaction or series of transactions.[8] Role's ADEA claim is accordingly precluded because it could have been presented to the Law Division of the New Jersey Superior Court when that court heard Atco's appeal of the Wage Collection Division's decision regarding Role's claim for vacation pay

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[7]Even though Role's vacation pay claim, which Atco argues precludes his claims here, was in the first intense addressed by an administrative agency and not a court, § 1738 is applicable because the agency's decision was subject to review (indeed, to the novo review) by a court. Cf. Astoria Federal Sav. & Loan Assoc. v. Solomino, 501 U.S. 104, 109-10 (1991).

[8]Rule 4:30A of the New Jersey Rules of Court states that "the [n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by thev entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave reqired for counterclaims or cross-claims in summary actions). The New Jersey Supreme Court in Oliver v. Ambrose provided the following account of the extensive scope of the doctrine:

> The entire controversy doctrine encompasses virtually all causes, claims, and defenses relating to a controversy. At minimun, all parties to a suit should assert all affirmative claims and defenses arising out of he underlying controversy. The doctrine also includes counterclaims and cross claims. In applying the doctrine, it is the core of facts that provides the link between distinct claims against the same parties and triggers the requirement that they be determined in one proceeding.

All the factors supporting the application of the doctrine are present. First the ADEA claim unquestionable rises from the same transaction or series of transactions as the vacation pay claim-Role's employment relationship with Atco. The two claims even appear to involve litigation of nearly identical factual issues: for the vacation pa claim, whether Role was dismissed for cause; for the ADEA claim, whether his dismissal was motivated b legitimate or discriminatory considerations.

Second, Role could have asserted his ADEA claims before the Law Division when it heard the appeal for his vacation pay claim. State courts have concurrent jurisdiction over the ADEA claims, see 29 U.S.C. § 626(c)(1) (allowing suits to be brought "in any court of competent jurisdiction"); and the Law Division is a court of original jurisdiction, generally empowered by the New Jersey rules to address all claims "so that all matters in controversy between the parties must be completely determined." N.J. Const., art. VI, 3, ¶ 4. Where the court has such general jurisdiction , it is the responsibility of the parties to present to it all claims arising from the same transaction or series of transactions. See Heir v. Delaware River Port Auth., Civil Action No. 01-5059, 2002 WL 1796580 (D.N.J. Aug. 6, 2002).

The Court of Appeals for the Third Circuit has summed up the doctrine's joinder requeriments in the following terms:

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[8](...continued)

152 N.J. 383, 394 (1998)(citations and internal quotation marks omitted).

> [I]f parties or persons will, after final judgment is entered, be likely to have to engage in additional litigation to conclusively dispose of their respective bundles of right and liabilities that derive from a single transaction or related series of transactions, the omitted components of the dispute or controversy must be regarded as constituting an element of one mandatory unit of litigation. Id. at 590-91

O'Shea v. Amoco Oil Co., 886 F.2d 584, 590-91 (3d Cir.1989).

Role argues that the court could not have heard his claim because it was addressing an appeal of an administrative decision. But this contention is fundamentally illogical: there is no reason to think that in providing for Law Division review of decisions by the Wage Collection Division, N.J. Stat. Ann 34:11-63, the legislature intended to somehow to limit its jurisdiction in any other respects. Just because Role could not have brought his ADEA claim before the Wage Collection Division, it does not follow that he could have not have brought it before the Law Division when it heard the appeal. While it is true that the application of the doctrine pressuposes equality of forum,[9] where claims first litigated in a limited forum

[9] "Application of the entire controversy doctrine requires equality of forum, that is, if the first forum must have been able to provide all parties with the same full and fair opportunity to litigate the issues and with the same remedial opportunities as the second forum." Hernandez v. Region Nine Housing Corp., 16 N.J. 645, 661 (1996).

are subject to review in a court of broader jurisdiction, the focus of the equality analisys should be the jurisdiction and powers ofthe reviewing court that ultimately enters the judgment not those of the administrative agency. Cf. Jones v. Holvey, 29 F.3d 828, 831-32 (3d Cir. 1994) (determining that the entire controversy doctrine was inapllicable because the Appellate Division of the Superior Court would not have exercised its original jurisdiction to hear witheld claims).[10]

The conclusion that the Law Division could have heard Role's ADEA claim is reinforced by the consideration that it review of the Wage Collection Division Decision is the novo, and parties coming before it on appeals have the right to present new evidence and witnesses to the court. See Marr v. ABM Carpet Serv., Inc., 286 N.J. Super. 500, 504-505 (N.J. Super. Ct. Law Div. 1995); N.J. Stat. Ann. 34:11-65. The relevant statutes even provide for a right to a jury trial of claims, with the administrative record submitted to the court. N.J. Stat. Ann. 34:11-66. Given the purposes underlining the entire controversy doctrine, it is difficult to imagine that proceedings involving a full blown jury trial in a court of general jurisdiction do not

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[10]This consideration distinguishes the present case from Kopin v. Orange Products, Inc., 297 N.J. Super. 353, 374-75 (N.J. Super. Ct. App. Div. 1997), in which the court held that a previous decision by the Wage Collection Division did not have preclusive effect upon a latter claim brought in the Superior Court. The court reasoned that the limited jurisdiction of the agency (including the cap on the amount of the monetary relief it could provide) prevented parties from bringing all their claims before it. But the case did not apparently involve an appeal to the Superior Court.

implicate the claim joinder requirements of Rule 4:30A.

Role also argues that he could not have brought his ADEA claim before the Law Division because he had not yet received his right to sue letter from the EEOC. But receipt of such letter is not a condition precedent to suit under the ADEA (as it is for actions under Title VII). See Seredinsky v. Clifton Precision Products Co., Div., of Litton Systems, Inc., 776 F.2d 56, 62-63 (3d Cir. 1985); 29 U.S.C. § 626(d). Role's obligaton to exhaust administrative proceduresbefore bringing his claim was satisfaied once he waited 60 days after filing a charge with the EEOC. Id. Document submitted with Role's opossition papers indicate that Role's chargewas filed on November 19, 2001. (The notice of charge sent to Atco, attached its moving papers, was received November 28, 2001.) Accordingly Role's right to bring suit arose well before the date the Law Division proceedings, and the absence of right to sue letter would not have prevented him for asserting his ADEA claims.

Because Role's cause of action was available to him when the Law Division heard his appeal, and because the court had the power to hear it, the entire controversy doctrine required him to bring his ADEA claim before the court. The failure to do so precludes him from litigating the claim here.[11]

[11]Atco also argues that Role's ADEA claim is barred by issue preclusion. It contends that the Law Division's decision that role was dismissed for cause precludes relitigation on the grounds and motives for his dismissal, and prevents him for showing that he was dismissed for discriminatory reasons. Atco argument in this issue is, however flawed: for finding from a previous case to prevent a party from litigating an issue, those findings have to address the identical issue, see Hernandez, N.J. at 659 (1996), and determining whether Role

B. Other Claims under Federal Law

Role's wrougful discharge claim is the only claim under federal law that is pleaded with any specificity or coherence in the Complaint, and it is not even clear from the Complaint what other claims he purport to assert, and what allegations are offered merely as a narrative context for his wrongful discharge claim. However, a combined reading of the Complaint and its accompanying affidavit, constructed with guidance from his opposition papers, does suggest that he intends to plead other claims under federal law. But the

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[11](...continued)
was dismissed for cause is not (at least not necessarily) the same as determining whether he was dismissed because of age. A dismissal can be deemed "for cause" merely because there are ligitimate grounds that support it. See. e.g., Greenwood v. State Police Training Center, 127N.J. 500, 509-11 (1992)("[A]though the good-cause standard eludes precise definitions, courts ordinarily uphold fidings of good cause when the employee's performance is deficient or when the employee creates a risk of harm to himself or herself or others.). Because discrimination is a quesion of fundamentally a question of motives, not grounds, an employment decision can be discriminatory even where legitimate grounds exist to support it. See, e.g., Fakette v. Aetna, Inc., F.Supp. 2d 722, 732-33 (E.D. Pa. 2001 (citing Hazen Paper Co. v. Biggins, 507 U.S. 6[illegible] 610 (1993) and noting that in an ADEA case "plaintiff's age must have actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome"; further noting that in mixed motives case, "[i]f the employee does produce direct evidence of discriminatory animus, the employer must then produce evidence sufficient to show that it would have made the same decision if illegal bias had played no role in the employment decision." (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989))). Accordingly, a finding that an employee was dismissed for cause does not

allegations that intimate such intentionsdo not actually state any claims on which relief can be granted.[12] First, Role alleges in the Complaint that on one occasion in December 2001 he

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[11](...continued)

preclude a later determination that he or she was also dismissed because of membership in a protected class. Cf. Bradley v.Pittsburg Bd. of Educ., 913 F.2d 1064, 1074-75 (3d Cir. 1990)(noting that a finding that a teacher was dismissed for under the statelaw determined only that purported reasons for the firing were "factually supported and legally sufficient" and did not preclude claim that he was dismissed because of activity protected by the First Amendment).

In addition, it is not even perfectly clear that the determination that Role was dismissed for cause was in fact necessary to the Law Division's decision on his vacation pay claim. Although the court does not appear to find specifically that Role was dismissed for cause prior to July 1, 2001, one cannot be certain whether the essential factor in the decision was the basis of his discharge or the date of it-or both. The court does not discuss in detail the terms of the agreement it refers.

[12]Even though, Atco, in its proposed Answer, addresses Role's harassment allegations as though they are intended at least in part to state claims of race-based hostility, one claim that Role seems not to intend to assert is any under Title VII o the Civil Right Act of 1964. Neither the Complaint nor Role's arguments refer to him as a member of a protected class under Title VII, nor do they specify the racial or ethnic class to which his replacement (or employees retained by Atco) belonged. (In the Intake Questionnarie submitted to the EEOC prior to the formal charge, Role did allege, in response to a specific question, that an employee of Pakistani descent was not disciplined for conduct similar to that which led to the Role's dismissal.) Although Role's brief discusses Title VII, it appears to do so as part of a discussion of the element of prima facie case of age discrimination (referring, as does the compliant, to the allegation that Role was replaced by a younger worker).

reported Atco's vice president that he "had been biased and abused by one of his coworkers." In his opposition papers he names the employee and asserts that his complaint was never documented or investigated. These allegations could be read as attempts to state a claim of hostile work environment under the ADEA, but fail to do so. They do not offer any description o the underlying abuse, and they fail to allege that it was animated by any class based animus.[13] They are accordingly insufficient even to provide the notice required under Fed. R. Civ. P. 8. Further, a claim of hostile work environment under Title VII or the ADEA (assuming the ADEA permits claims for hostile work environment) require allegations of harassment "sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment." Nerosa v. Storecast Merch. Corp., 2002 WL 1938181, at *4 (E.D. Pa. 2002). An allegation such as Role's apparently referring to a single incident and providing no indication that it was severe, does not state a claim under Fed. R. Civ. P. 12(b)(6).

Second, the Complaint alleges Atco "fabricated" Role's discharge as a part of a "conspiracy" with unspecified third parties (and with an unspecified object). In attempting to fill out and clarify these charges, Role's brief sketches a conspiracy between Atco and another

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[13] Similarly. the specific instances of name--calling alleged against Atco's vice-president do not involve insults couched in terms specifics to a protected class; nor is there anything about them to suggest they were motivated by animosity toward a protected class.

former employer with which he was engaged in litigation-suggesting that his discharge from Atco was somehow part of the scheme to fabricate evidence to influence the case involving Role's other employer. Role suggests that he views this conspiracy as a violation of 42 U.S.C. 1985(3). But even as impermissible supplemented in his papers, these allegations do not state a claim under § 1985(3)(or, for that matter, § 1985(2)). Role states no allegation of class based animus-as is required for claims under § 1985(3), Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), and under the second portion of § 1985(2) see Brawer v. Horowitz, 535 F.2d 830, 840 (3d Cir. 1976); and the conduct alleged does not represent the kind of inference with federal court proceedings that would amount to a violation of the first portion of 1985(2). See Id.

Third, in his brief (but not in his Complaint) Role contends that Atco violated his "Constitutional right to privacy"- a charge which of course fails because Atco is not alleged to be in any sense a state actor.

Finally, Role suggests in the Complaint and in his papers that Atco reneged on a promisee of health insurance plan and that such plan available to others workers in the same area. His brief appears to indicate that these allegations are intended to support a claim under New Jersey Law for discrimination in the provision of insurance (althought age is not a protected class under the statute he invokes). N.J. Stat. Ann. 17B:30-12. If they are intended also to state a claim under federal anti-discrimination law, they do not: neither the Complaint nor Plaintiff's papers offer any specific

allegation that the health plan was withheld because of Role's membership in any protected class; nor does the Complaint even indicate that the employees to whom the health plan was provided were not members of a protected class to which Role belonged.[14]

II. State Law Claims

Apart from any claims under federal law, the Complaint and Plaintiff's papers apparently purport to state an array of claims under state law, including defamation and fraud. Subsection (c) of 28 U.S.C. § 1367 permits a court to decline to exercise supplemental jurisdiction when "the district court has dismissed all claims over which it has original jurisdiction." The Court of Appeals has stated

> [W]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.

---

[14] With the possible exception of the conspiracy claim (which could be read to refer in part to events surrounding proceedings in the Law Division), al the federal claim that Role appears to intent to present arise from his employment relationship with Atco and were available to him before the La Division addressed his Wage Collection Division Claim. Accordingly, as the discussion above implicitly demonstrates, even if the allegations sufficiently stated claims on which relief could be granted, they would be barred by the entire controversy doctrine along with Role's ADEA wrongful discharge claim.

Borough of Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995). In view of the fact that all of Role's federal claims must be dismissed, the court will exercise its discretion to dismiss any state law claims for lack of subject matter jurisdiction.

CONCLUSION

For the reasons stated above, the motion of defendant Atco. Products to amend its Answer will be granted. Its motion to dismiss the Complaint will be treated as a motion for judgment on the pleadings and granted with respect to Plaintiff's claim under the ADEA, 42 U.S.C § 1985, the United States Constitution. Plaintiff Eloy A. Role's motion for judgment on the pleadings will be denied with respect to the same claims. The Court declines to exercise jurisdiction over any claims asserted under state law. An appropriate order will be entered.

"s/

Dickinson R. Debevoise
U.S.S.D.J.

Dated: October 23, 2002

UNITED STATE DISTRICT COURT
DISTRICT OF NEW JERSEY

ELOY A. ROLE, pro se Plaintiff, v. ATCO PRODUCTS, INC., Defendant	Civ.No. 02-2485 (DRD) **ORDER**

DEBEVOISE, Senior District Judge

This matter having been opened to the Court by motion of Defendant, Atco Products Inc., for leave to amend its Answer and for dismissal of the Complaint, and by cross-motion of the Plaintiff Eloy A. Role for judgment on the pleadings, and notice having been given to all parties, in consideration of submissions, and for the reasons set forth in the Court's opinion of even date,

IT IS, on this 23 day of October 2002, ORDERED as follows:

1. Defendant's motion for leave to amend its Answer is GRANTED.

2. Plaintiff's claims under federal law, including claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.

42 U.S.C. § 1985; and the Constitution of the United States, are DISMISSED.

3. Plaintiff's remaining claims are DISMISSED without prejudice for lack of subject matter jurisdiction in the exercise of the Court's discretion under 28 U.S.C. § 1367(c)

4. Plaintiff's motion for judgment on the pleadings is DENIED.

"s/Dickinson R. Debevoise"

Dickinson R. Debevoise, U.S.S.D.J.

DECISION OF THE APPEAL TRIBUNAL

State of New Jersey
Department of Labor
Division of Programs
APPEAL TRIBUNAL
CN 936 LABOR BUILDING
Trenton, NJ 08625-0936

S.S. # 595847864
Docket # 01-A-12446-000-R1
Lo 937 PC 10
Date of Claim 04/22/2001
Appellant claimant
Date Det Mailed 05/17/2001
Date AT Dec Mailed 11/30/2001

IN THE MATTER OF : ELOY A. ROLE

ELOY A. ROLE
22 GARRISON ST
NEWARK NJ 071050000

EMPLOYER: ATCO PRODUCTS INC

The claimant appealed from a decision of the Appeal Tribunal (AT-01-A-12446-000-R0) which affirmed the determination of the Deputy and held the claimant disqualified for benefits from 04/22/01 to 06/02/01.

The Board of Review (BR-01-B-04096-000-X0), by order mailed on 10/0/01 remanded the matter to the Appeal Tribunal for rehearing and a new decision.

The claimant and employer appeared.

FINDING OF FACT:

The claimant appealed on 05/03/01 from a determination of the Deputy, mailed on 05/17/01, holding him disqualified for benefits from 04/22/01 through 06/02/01 on the ground that he was discharged for misconduct connected with work.

The matter was remanded due to the lack of an audible record of the hearing held on 09/10/01.

The audible record (two tapes) have been located and forwarded for review.

OPINION:

Since an audible record is available, the matter is returned for review.

DECISION:

An audible record is available an the matter is returned for review.

REOPENED	:	OCTOBER 30, 2001
HEARING	:	NOVEMBER 27, 2001
DATED	:	NOVEMBER 29, 2001
TYPED	:	NOVEMBER 29, 2001
MB: mg		UA

"s/ Mary Bland"

Appeals Examiner I

WC-1236-0601-FAR

Eloy A.Role Vs. Atco Products

Appearances

On July 19, 2001 the plaintiff Eloy A. Role, appeared pro se at the Office of Wage Collection, New Jersey department of labor. The defendant was not present to defend against the claim.

Finding of Fact

Under oath the plaintiff stated that the company policy was after one year of employment hat an employee would get one week of vacation. He had been with the company from July 16, 2000 until April 26, 2001 and was paid a rate of $18.50 per hour during his employment as a tool and die maker. The company did not have the vacation policy in writing. The week of vacation would be worth 40 hours and he was asking for $740.00 (18.50 per hour times the forty hours).

Since the plaintiff had only been at the company for a full 9 months he would not be due the full year of benefits. 40 hours divided by 12 months times the 9 months times the $18.50 per hour equals $554.45.

He stated that Martin Gorstein, the company president, had verbally promised

him that he would pay him his vacation. "If you have something due to you, I will send you a check". The plaintiff had never received a check, not even when the company closed for summer vacation from July 1, 2001 to July 19, 2001. The plaintiff felt that the promise meant that he would get his earned vacation in July.

The defendant was not present and thus could not dispute what the plaintiff testified to.

Opinion

N.J.S.A. 34:11-57 definition of "Wages" means any moneys due an employee from the employer whether payable by the hour, day, week, semimonthly, monthly or yearly and shall include commission, bonus, piecework compensation and other benefits arising out of an employment contract.

According to the testimony the plaintiff had earned the benefit of the vacation hours during his employment and he had not been pay those due moneys.

Decision

The decision rendered was an "Award by Default" for the plaintiff because the defendant did not appear. The amount awarded was $554.45 for the vacation earned. There was a 10% administrative fee of $55.45 and $25.00 for the costs of the summons due for the Department of labor.

"s/ Silvia J. Farley"
Silvia J. Farley, Referee

Dec 26 '2001
Date

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY

DOCKET NUMBER: ESX-L -387-02
Case # WC- 1236-0601-FAR

ELOY A. ROLE

Plaintiff CIVIL ACTION

VS. ORDER

ATCO PRODUCTS INC

THIS MATTER being opened at the Essex County Superior Court by defendant on Feb. 28, 2002, and for good cause shown:

IT IS hereby on this 28th day of February, 2002

ORDERED that Plaintiff' Claim is dismissed, and judgment entered on behalf of defendant Atco Products Inc., the Court having found after testimony as facts that Plaintiff was discharged for cause prior to June 1st, 2001 and under the terms of the agreement he forfeited any and all rights to accrued vacations.

"s/ Claude Coleman "
HON. CLAUDE M. COLEMAN, J.S.C.

UNITED STATES COURT OF APPEALS
for the
THIRD CIRCUIT

Case No.02-4257

ELOY A. ROLE

Appellant,

-against-

ATCO PRODUCTS,

Appellee.

ON APPEAL FROM ORDERS ENTERED IN THE
UNITED STATES DISTRICT COURT OF
NEW JERSEY
NEWARK AT NO. 00-CV-2485(DRD)

BRIEF ON BEHALF OF APPELLEE

Grotta, Glassman & Hoffman, P.A.
Attorneys for Appellee
75 Livingston Avenue
Roseland, New Jersey 07068
(973) 992-4800

On the Brief
Jed L. Marcus, Esq.

COUNTERSTATEMENT OF CASE

This matter stems entirely from the employment relationship once shared by appellant, Eloy A. Role ("Role"), and appelle, Atco Products, Inc., his former employer (Atco"). Role, a tool and die maker, was discharged from emloyment for negligence in the performance of his duties. B.A2.12 pp. 2-3. Role filed for unemployment and lost. Id. at p.4. Role also filed a claim with the United States Equal Employment Opportunity Commission ("EEOC") in which he alleged he was a victim of age discrimination. Id. at p. 5 He also filed a wage claim with the New Jersey Department of Labor, Division of Wage and Hur Compliance ("DOL") in which he alleged that he was owed vacation pay at the time of his discharge. Id.

The DOL granted Role's wage claim because Atco inadvertently failed to appear at the hearing. Id. at p.5. Atco appealed to the Essex County Superior Court, a court of general jurisdiction. Id. The matter was heard in a *de novo* hearing by the Honorable Caude M. Coleman, J.S.C. Id.; see also SA-35. Judge Coleman concluded that Role had been discharged for cause, and therefore dismissed the matter. SA-35

Shortly thereafter, Role initiated yet another action, this time in the United States District Court, District of New Jersey. BA-2.1 Role claimed that he was

UNITED STATES COURT OF APPEALS
for the
THIRD CIRCUIT

Case No.02-4257

ELOY A. ROLE

Appellant,

-against-

ATCO PRODUCTS,

Appellee.

ON APPEAL FROM ORDERS ENTERED IN THE
UNITED STATES DISTRICT COURT OF
NEW JERSEY
NEWARK AT NO. 00-CV-2485(DRD)

REPLY BRIEF OF APPELLANT

Eloy A. Role
Pro se Appellant
22 Garrison ST.
Newark, N.J. 07105
(973) 491-9708

On the Brief
Eloy A. Role

the issue is concurrent with the case at bar.

3. THE DISTRICT COURT INCORRECTLY APPLIED THE ENTIRE CONTROVERSY DOCTRINE.

At this stage, Plaintiff will degrade Defendant's contentions in regard to its considerations on the N.J. R. 4:30A and its preclusionary effects in the case at hand, Plaintiff will procced following procedural events starting at the State Court.

Defendant in a bold attempt to stroll the unchartered territory of frivolous pleadings, once again,

previously took a successful endeavor at the District Court at page 2 ¶ 2 of its Brief on Behalf of Appellee:

"The DOL granted Role's wage claim because Atco "inadvertently" failed to appear at the hearing.
(emphasis added by Plaintiff).

such affirmative statement has drifted this Court into the stream of deceit. Atco did assist to the hearing held on July 19, 2001 on or about 9:30 and 11:30 a.m. via telephone, there was a telephone conversation between Atco and Silvia Farley referee, that lasted about forty five minutes to an hour. There was not an Award By Default, the appeal to the decision of the Wage Collection Division was propelled by Atco in order to subdue the federal law abusing the state law, most probably Atco had guidance by Counsel.

Atco knew the move would enable it to invoke N.J. R. 4:30 A. at later stages in the event of Plaintiff's lawsuit. Telephone records from the Wage Collection Division can easily clear up Plaintiff's contentions.

.....

Atco New Employee Data Record

Name: Role Eloy A.
SS# 595-84-7864 Date of Birth: 9 17 41
Present Address 22 Garrison St.
City NWK 07105
Prior address 633 Franklin Ave
City Nutley 07011
How long at the Present Address 3 Yrs.
How long at Prior Address 3 Yrs.

8) Have you ever filed a claim for workers compensation due to an injury or illness? ☐Yes ☒No

Atco Products, Inc., Phone:973-242-5757
Fax: 973-242-0131

169-203 Frelinghuysen Avenue
Newark, New Jersey 07114-1595 USA

May 11, 2001

518 457-6386

Interstate Unit 518-4576386

PO Box 1559
Albany, NY 12201-1559

To Whom It May Concern:

It has come to our attention that the above individual, who was recently discharged for cause, may have been collecting unemployment or disability benefits in New York during his work at our facilty in New Jersey. He was employed here from 7/19/2000 through 4/26/2001.

A New York driver license #217 185 362 was one of the forms of identification that this individual used.

Sincerely yours,

"s/ Martin Gorstein"

Martin Gornstein

President

ALAN B. PEARL & ASSOCIATES, P.C.
BY ALAN B. PEARL (AP-2409)
Attorneys for Defendant Die-Matic Products, Incl.
6800 Jericho Tpke. - Ste. 218E
Syosset, N.Y. 11791

UNITED STARES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELOY A. ROLE,

Plaintiff,

-against-

EUREKA LODGE NO. 434
i.a. OF m. and A.W., AFL-CIO
DIE-MATIC PRODUCTS, INC.,

Defendants.

Case No. 00-CV-4781
(HURLEY, J.,
BOYLE, M.)

DEFENDANT DIE-MATIC PRODUCTS, INC.'S FIRST REQUEST FOR INTERROGATORIES

INTERROGATORY NO. 7: Were you unable to work during any period of time between March 1, 2000 and August 23, 2002? If the answer is yes, indicate the dates of each incapacity and the reason for the inability to work during those periods of tie.

INTERROGATORY NO. 8: Did you receive disability benefits during any period of time between January 1, 1990 and August 22, 2002? If yes, indicate between which dates you received benefits, who paid you such benefits and the amount of the benefits paid each week/month and the name and address of the employer who had the disability policy if other than yourself.

INTERROGATORY NO. 9: Did you receive any unemployment insurance benefits at any time in the United States? If the answer is yes, state the dates you received benefits, the weekly amounts, included a detailed description of the reasons you received bnefits (e.g., laid off, fired, etc.).

INTERROGATORY NO. 10: Did you receive any Workers' Compensation benefits at any time while in the United States? If the answer is yes, state the dates you received benefits and the amount, included a detailed description of the reasons you received benefits, and the name and address of the employer who had the compensation insurance policy.

Dated: Syosset, New York
August 22, 2002

ALAN B. PEARL & ASSOCIATES P.C.

"s/ Alan B. Pearl"
ALAN. B. PEARL (AP-2409)

Attorney for Defendants
Office & P.O. Address
6800 Jericho Tpke.-Ste.
218-E
Syosset NY 11791
(516) 921-6645

To: ELOY A. ROLE
Plaintiff pro se
51 MacDougal St. - Apt. #64
New York NY 10012

BALL LIVINGSTON, ESQ.
ATT: LYNN KRAMER, ESQ.
661 Franklin Ave., Nutley, N.J. 07110
Attorney for Defendant Eureka Lodge
No. 434

Supreme Court, U.S.
FILED
MAR 1 - 2004
OFFICE OF THE CLERK

No. 03-1084

IN THE

Supreme Court of the United States

ELOY A. ROLE,

Petitioner,

v.

ATCO PRODUCTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

JED L. MARCUS
Counsel of Record
RUSSELL J. MCEWAN
GROTTA, GLASSMAN & HOFFMAN, P.A.
75 Livingston Avenue, 3rd Floor
Roseland, N.J. 07068
(973) 992-4800

Counsel for Respondent

186028

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Atco Products, Inc. ("Atco"), has no parent corporation. There is no publicly held company that holds 10% or more of Atco's stock.

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REASONS FOR DENYING THE PETITION

Petitioner Eloy A. Role's Petition for Writ of Certiorari ("Petition") should be denied. The United States Court of Appeals for the Third Circuit ("Court of Appeals") correctly affirmed the decision of the United States District Court, District of New Jersey ("District Court"), which dismissed Petitioner's frivolous complaint against his former employer, Atco.

The Petition does not reveal a departure by the District Court or the Court of Appeals from the accepted and usual course of judicial proceedings, and fails to identify any important federal question that has been decided in a way that conflicts with relevant decisions of any court. Instead, the Petition simply rehashes arguments that have been considered and soundly rejected by every court that has thus far reviewed this matter.

By way of background, Petitioner was discharged from his employment as a tool and die maker with Atco for negligence in the performance of his duties. Pet., App A.6 at 4. In response, Petitioner filed numerous claims against Atco. *Id.* at 4-5. One claim, filed with the New Jersey Department of Labor, Division of Wage and Hour Compliance ("DOL"), alleged that Petitioner was owed vacation pay at the time of his discharge. *Id.* at 4. The DOL granted Petitioner's wage claim.

Atco appealed to Essex County Superior Court, a court of general jurisdiction ("Superior Court"). *Id.* The matter was heard in a *de novo* hearing. *Id.* at 5. The Superior Court concluded that Petitioner had been discharged for cause, and therefore dismissed the matter. *Id.*

Shortly thereafter, Petitioner initiated an action in the District Court. *Id.* In that action, Petitioner claimed that he was discharged on the basis of his age, in violation of the Age Discrimination in Employment Act ("ADEA"). *Id.* He also asserted numerous other claims based on a variety of Constitutional, statutory and common-law grounds. *Id.*

The District Court dismissed Petitioner's federal claims based, in part, on New Jersey's "entire controversy doctrine," whereby parties failing to join their claims face preclusion of the omitted claims. The District Court also dismissed certain of Petitioner's claims for failure to state a claim upon which relief could be granted. *Id.* at 6. The District Court declined to exercise jurisdiction over Petitioner's state law claims. *Id.* Thus, Petitioner's case ended. Petitioner appealed. The Court of Appeals affirmed the holding of the District Court. Pet., App. A1. This Petition followed.

Petitioner now contends (again) that the District Court erred when it permitted Atco to amend its answer to state the affirmative defense of issue preclusion, and when it barred claims under the entire controversy doctrine. Petitioner further contends that the Court of Appeals abused its discretion when it found Petitioner's conspiracy and privacy claims to be without merit, and when it disregarded Petitioner's contention that Atco's counsel made "false pleadings" regarding the Company's participation in the DOL proceeding. Pet. at 3-4.

As set forth in detail below, the Petition offers nothing new with respect to any of these arguments. In essence, the Petition alleges that the lower courts misapplied properly stated rules of law and/or made erroneous factual findings. Under the rules of this Honorable Court, such allegations

are rarely a sufficient basis upon which to grant a petition for a writ of certiorari. That is especially true where, as here, Petitioner has failed to establish any misapplication of the law or incorrect factual findings. Under these circumstances, the Petition should be denied.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DECISION TO GRANT ATCO LEAVE TO AMEND ITS ANSWER.

Petitioner contends that the District Court erred when it held that Atco could amend its Answer to assert the affirmative defense of issue preclusion, and that the Court of Appeals erred when it affirmed that decision. Pet. at 6-7.

Federal Rule of Civil Procedure 15(a) governs amendments to pleadings. Leave to amend under this rule is liberally given. *See Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *accord Coventry v. United States Steel Corp.*, 856 F.2d 514, 519 (3d Cir. 1988). Denial of leave to amend must be based on a showing that the non-moving party would be "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely." *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989) (internal citation omitted). Delay in and of itself will not serve as a basis for denying leave unless the plaintiff is prejudiced, and *prejudice is ordinarily not presumed to exist unless the motion to amend is made during or after trial. Jean-Air Products, Inc.*, 283 F. Supp. 591, 594 (E.D. Pa. 1968).

In this case, the Court of Appeals specifically found that Petitioner was not prejudiced. Pet., App. A1 at 5. Instead, the Court of Appeals noted that Petitioner "addressed the new affirmative defense at length in his cross-motion for judgment on the pleadings, and the District Court considered his arguments before issuing its opinion and Order." *Id.*

The District Court and the Court of Appeals relied on the appropriate rule of law regarding amendment of a complaint. The Petitioner has failed to establish that they did not, or that he was prejudiced by the amendment. The Petition should therefore be denied.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S § 1985 CLAIMS.

Petitioner contends that the District Court erred by dismissing his claims of conspiracy under 42 U.S.C. §§ 1985(2) and (3), and that the Court of Appeals erred by affirming the dismissal. Pet. at 13-20. However, even after numerous attempts, Petitioner has *still* not alleged the elements necessary to state a cause of action under either section of the statute. Even if he had, his claims in this regard were barred by the entire controversy doctrine. *See* Pet., App. A2 at 10-11.

With respect to the claim that Respondent violated § 1985(2), the Court of Appeals correctly held that Petitioner failed to allege facts to establish a violation. Pet., App. A1 at 9. Specifically, the court noted that Petitioner "did not allege that [Respondent] conspired to deter him by force, intimidation, or threat from attending court or testifying freely in any pending matter." *Id.* In an attempt to cure this

fatal defect, Petitioner now alleges (for the first time) that Atco conspired with Petitioner's former employer because Petitioner "was attending federal proceedings in a civil lawsuit against his former employer and unions." Pet. at 16. The problem with Petitioner's argument is that he has *still* failed to articulate what the alleged conspiracy was. Further, whatever the conspiracy was, Petitioner has failed to establish how such conspiracy deterred him by force, intimidation, or threat from attending court or testifying freely in any pending matter. In sum, Petitioner's claim under § 1985(2) is incomprehensible, and the Petition should be denied as it relates to this claim.

To establish a claim under § 1985(3), Petitioner was required to establish a conspiracy based on class-based animus. Pet., App. A1 at 9. The Court of Appeals concluded that since Petitioner's ADEA claim lacked merit, the § 1985(3) claim could not be predicated on age. *Id.* To the extent that Petitioner now alleges that his § 1985(3) claim is based on his race, such allegations should be rejected, as they are made for the first time herein. *See* Pet., App. A1 at 9, A2 at 17-18. In the alternative, any such conspiracy claim that was grounded in Petitioner's employment relationship with Atco is precluded by the entire controversy doctrine because Petitioner failed to raise it before the Superior Court. Pet., App. A2 at 9-11. Finally, even assuming, *arguendo*, that Petitioner was not barred from pressing this new argument for the first time herein, Petitioner's claim still fails because he never explained how the facts alleged constitute a conspiracy. Pet. App., A1 at 9.

In light of these considerations, the lower courts were correct in dismissing Petitioner's § 1985(2) and (3) claims. The Petition, as it relates to these claims, should be denied.

III. THE COURT OF APPEALS CORRECTLY AFFIRMED DISMISSAL OF PETITIONER'S PRIVACY CLAIMS.

Petitioner claims that the District Court erred in dismissing his common law privacy claims, and that the Court of Appeals improperly affirmed the dismissal. Pet. at 19-20. Petitioner is wrong for two (2) reasons. First, Petitioner did not raise these claims before the District Court. Pet., App. A1 at 9. Instead, they were raised for the first time on appeal. Accordingly, they were properly dismissed by the Court of Appeals. *Id.* Second, even assuming Petitioner could raise these claims for the first time on appeal, these claims too would be barred by the entire controversy doctrine. Pet., App. A2 at 9-11.

Accordingly, the lower courts were correct in dismissing Petitioner's common law invasion of privacy claims, and the Petition in this regard should be denied.

IV. THE COURT OF APPEALS PROPERLY DISMISSED PETITIONER'S ADEA CLAIM ON THE MERITS.

The District Court dismissed Petitioner's ADEA claim on procedural grounds.[1] The Court of Appeals, however, went beyond mere procedural issues and instead undertook a comprehensive examination of the record related to Petitioner's ADEA claim. The Court of Appeals concluded Petitioner's ADEA claim was unsustainable as a matter of law, and therefore dismissed the claim. As discussed below, the Court of Appeals' decision was proper, and should not be disturbed.

---

1. *See infra*, Point V, pp. 8 to 11.

The Court of Appeals correctly explained that to establish a *prima facie* case of age discrimination in violation of the ADEA, a party must establish that:

> (1) he was 40 years of age, (2) he was qualified for the position in question, (3) he suffered an adverse employment action, and (4) he was replaced by a sufficiently younger person so as to create an inference of age discrimination. If plaintiff establishes a *prima facie* case, an employer must rebut the presumption of age discrimination by stating a legitimate non-discriminatory reason for the adverse employment decision. The plaintiff then has the opportunity to demonstrate that the employer's proffered reason was a pretext for discrimination.

Pet., App. A1 at 6-7 (citing *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir. 1995)).

In this matter, the Court of Appeals found that Petitioner established a *prima facie* case of age discrimination because he alleged "that he was fifty nine years old at the time of the discharge, had experience as a tool and die maker, and was purportedly replaced by someone at least twenty years younger." Pet., App. A1 at 7.

The Court of Appeals noted, however, that "Atco claimed . . . that [Petitioner] was discharged for negligence," and had thus proffered a legitimate, non-discriminatory reason for Petitioner's discharge. *Id.* The Court of Appeals examined the record for evidence of inconsistencies that could support an inference that Atco did not act for the stated reason, *and found none*. *Id.* The Court of Appeals concluded that

Petitioner "did not, and cannot, demonstrate that Atco's proffered reason was a pretext for discrimination." Petitioner's ADEA claim was therefore dismissed on the merits. *Id.*

The Court of Appeals dismissal of Petitioner's ADEA claim was in accordance with properly stated law and based on undisputed facts. Accordingly, the petition should be denied.

V. THE DISTRICT COURT DID NOT ERR IN ITS APPLICATION OF THE ENTIRE CONTROVERSY DOCTRINE.

Petitioner incorrectly maintained that the District Court erred when it found his ADEA claim barred by the entire controversy doctrine. In support, Petitioner contends that he could not have asserted his ADEA claim before the District Court action, since the Superior Court lacked jurisdiction to hear it. Pet., App. A2 at 9-14. As discussed below, Petitioner is simply wrong. The Superior Court had jurisdiction to hear his ADEA claim, and the entire controversy doctrine required that he assert the claim — as well as any others that he had related to his employment with Atco — in the Superior Court action.

Even if the District Court erred in its application of the entire controversy doctrine, which Atco denies, the issue is now moot. Specifically, the Court of Appeals in its review of the District Court's decision went *beyond* the entire controversy doctrine, and concluded that there was *no merit to the underlying cause of action*. Thus, even if Petitioner's ADEA claim should not have been dismissed by the District Court — which Atco also denies — the claim has since been considered and rejected by the Court of Appeals.

A. *The Entire Controversy Doctrine*

Under New Jersey law, parties failing to join their claims face preclusion of the omitted claims pursuant to New Jersey Court Rule 4:30A, entitled the Entire Controversy Doctrine. That rule provides:

> Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine.

Cases decided under New Jersey law have consistently held that the entire controversy doctrine requires the mandatory joinder of *all claims to a single transaction*. *See Falcone v. Middlesex County Medical Society*, 47 N.J. 92, 219 A.2d 505 (1966) (emphasis added); *W.M. Blanchard Co., v. Beach Concrete Co., Inc.*, 150 N.J. Super. 277, 375 A.2d 675 (App. Div. 1977). This doctrine "encompasses virtually all causes, claims, and defenses relating to a controversy," including counterclaims and cross-claims. *Cogdell v. Hospital Ctr at Orange*, 116 N.J. 7, 15-18, 560 A.2d 1169 (1989); *accord Prevratil v. Mohr*, 145 N.J. 180, 187, 678 A.2d 243 (1996) (stating that "[a]t a minimum, all parties to a suit should assert all affirmative claims and defenses arising out of the underlying controversy"); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 289, 662 A.2d 509 (1995); *Boardwalk Regency Corp., v. Square Brighton Corp, Inc.*, 288 N.J. Super. 494, 500, 672 A.2d 1185 (App. Div. 1996). It is the for the court to decide whether claims must be joined under the entire controversy doctrine. *See Boardwalk Regency Corp., supra*, 288 N.J. Super. at 503, 672 A.2d 1185. (explaining that "discretion to determine whether joinder is required is reserved solely to the trial

court"). Indeed, "[a] plaintiff who fails to allow the trial court the opportunity to supervise the entire controversy risks losing the right to bring that claim later." *Id.* (citations omitted). Federal courts are required, under 28 U.S.C. §1738, "to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgment emerged." *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 466, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

B. *Jurisdiction of the Superior Court.*

The Superior Court of the State of New Jersey is a court of "original general jurisdiction *in all causes*." N.J. Const. 1947, Art. 6, § 3, ¶2 (emphasis added). Thus, the Superior Court had jurisdiction to hear any and all claims that Petitioner may have had related to his employment. Further, the Superior Court's review of a DOL action is *de novo*. *See Marr v. ABM Carpet Service, Inc.*, 286 N.J. Super. 500, 504, 669 A.2d 864 (Law Div. 1995). Petitioner thus had the opportunity "to produce any witness not produced or sworn in the court below, or any documentary evidence not offered or admitted in the court below. . . ." *See N.J.S.A.* 34:11-65.

C. *Review of the District Court's Decision.*

In light of the above, it is clear that Petitioner had a sufficient opportunity, as well as an obligation, to raise all claims related to his employment (including his ADEA claim) in Superior Court. He simply failed to do so.

The Court of Appeals agreed that the Superior Court had jurisdiction over Petitioner's ADEA claim. Pet., App.

A1 at 6. It did not decide the entire controversy issue, however, as the Court of Appeals found Petitioner's ADEA claim to be without merit. *Id.* at n. 2. Specifically, the Court of Appeals found that Petitioner failed to proffer any evidence of pretext to rebut Atco's legitimate business reason for his discharge (*i.e.* negligence in the performance of his work). Pet., App. A1 at 7. Although the Court of Appeals never reached the entire controversy question, it plainly went *beyond* what was required to affirm the District Court's decision by addressing the underlying merits of the ADEA claim. Pet., App. A1 at 6. Had the Court of Appeals reached the issue, it surely would have concluded, in accordance with settled precedent, that the District Court correctly applied the entire controversy doctrine.

Since Petitioner's ADEA claim was found to be without merit, Petitioner's joinder argument is moot, and the Petition should be denied.

VI. PETITIONER'S CLAIM THAT ATCO'S COUNSEL MADE "FALSE PLEADINGS" IS UNTRUE.

Petitioner contends that counsel for Atco made "false pleadings" when the undersigned represented to the Court of Appeals that Petitioner's judgment at the DOL was a default judgment. Pet. at 4-6. This argument is specious. The DOL itself stated in its January 7, 2002 Decision that it was an "Award by Default." Pet., App. A4. Further, the DOL also represented in the Decision that Atco "was not present to defend itself against the claim," and "was not present and thus could not dispute what the plaintiff testified to." *Id.* In light of these very clear and undeniable references to a default judgment, Petitioner's argument must be rejected.

CONCLUSION

For all of the foregoing reasons, Atco respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

JED L. MARCUS
Counsel of Record
RUSSELL J. MCEWAN
GROTTA, GLASSMAN & HOFFMAN, P.A.
75 Livingston Avenue, 3rd Floor
Roseland, N.J. 07068
(973) 992-4800

Counsel for Respondent

TO BE RECOVERED

Supreme Court, U.S.
FILED
MAR 8 - 2004
OFFICE OF THE CLERK

(3)

No. 03-1084

IN THE

SUPREME COURT OF THE UNITED STATES

ELOY A. ROLE

Petitioner,

vs.

ATCO PRODUCTS INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

Eloy A. Role
Petitioner *pro-se*
22 Garrison Street
Newark, NJ 07105
(862) 452-2003

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RELATED CASES AND PROCEEDINGS

There is an appeal by Petitioner waiting adjudication before the New Jersey Department of Labor, Board of Review, Docket No. 01-B-02766-000-XO.
The appeal relates to a charge of misconduct at the work place made by Respondent against Petitioner.

There is a Motion to File Judicial Notice pending adjudication before this Court.

REASONS TO GRANT THE PETITION

Petitioner Eloy A. Role's Petition for Writ of Certiorari ('Petition") should be granted.
Respondent and its Counsel(s) lost standing in the Courts including the Supreme Court when Respondent lied at the Essex County Superior Court alleging it was appealing a default judgment in favor of the Petitioner granted by the New Jersey Department of Labor Division of Wage and Hour Compliance. Respondent made appearance at the hearing via telephone.
Counsel(s) for the Respondent and Respondent itself lied at the District Court, Court of Appeals and Supreme Court when they sustained that a default judgment was granted by the New Jersey Department of Labor Division of Wage and Hour Compliance in favor of the Petitioner for the same reasons stated above.

Respondent went further in its system of lies when testifying before the Essex County Superior Court Law Division on Februry 28, 2002 asserting Petitioner was under the umbrella of an "agreement" of a union that acts at the Respondent's facilities. *See* Appendix E at page A-5 of the Petition.

Contentions by Respondent that it could amend its original Answer to the Petitioner's Complaint are baseless, the New Jersey Court Rules R. 4:30A barred Respondent of asserting an affirmative defense after it filed its original Answer. Fed. R. Civ P. 15(a) did not govern the amendment in the case at bar.

Respondent was barred of invoking N.J. Court Rule R. 4:30A, Entire Controversy Doctrine, Petitioner had and has an appeal waiting adjudication before the New Jersey Department of Labor, Board of Review, Docket No. 01-B-02766-000-XO.

Primary jurisdiction favored by the Court of the State of New Jersey and the rest of the courts barred Respondent to take Petitioner's case to the Superior Court of the State of New Jersey. Plaintiff was fired an replaced by somebody 20 years younger than him, Respondent framed itself into the provisions of the ADEA.

Respondent accused Petitioner of misconduct and negligence at work; such affirmation forms part of the conspiracy masterminded by Respondent and third party defendants already mentioned by Petitioner. Petitioner caused no damages to Respondent. Its claim of negligence was frivolous and fraudulent framing Respondent in a conspiracy and fabrication.

Respondent by the fact of disclosing Petitioner's file violated Petitioner's

constitutional rights.

I
THE COURT OF APPEAL IMPROPERLY AFFIRMED THE DISTRICT COURT'S DECISION TO GRANT ATCO LEAVE TO AMEND ITS ANSWER

The New Jersey Court Rule R. 4:30A is a State Court Rule not a Federal Rule of Civil Procedure.

The said State Court Rule, Entire Controversy Doctrine is crystal clear in the sense that being the Rule an affirmative defense, it is waived if not invoked at the original answer to a plaintiff's complaint.

Thereafter, having the State of New Jersey a Rule for joinder of claims it does not need Fed. R. Civ. P. 15(a) in order to articulate when and under which conditions an answer could be amended.

R. 4:30A barred Respondent to amend its Answer.

The Rule under the subsection 2, ¶ 2 states:

> **Construction and application, genarally.**
> Since preclusion under the entire controversy doctrine is an affirmative defense like any other preclusionary doctrine, it is waived if not timely raised. Kopin v. Orange Products, Inc., 297 N.J. Super. 353, 375 (app. Div.). certif. den. 149 N.J. 409 (1997). See also Aikens v. Schmidt, 329 N.J. Super. 335 (App. Div. 2000).

See also Brown v. Brown 208 N.J. Super. at 372, 384, 506 A.2d. 29 (App.Div.1986). R. 4:5A-4 provides in part that "[a] responsive pleading shall set forth specifically a statement of facts constituting an avoidance or affirmative defense..."[A]n affirmative defense is waived if not pleaded or otherwise timely raised." Brown v. Brown, *supra*, 208 N.J.Super. at 384, 506 A2d 29 (citing R. 4:6-7). In addition, a party's conduct can stop him/her from relying in an affirmative defense.

In the Respondent's Counsel(s) view, rules that could have been applied to amend its answer are a moving target, shifting to them according to the Counsel(s) needs.

Counsel(s) reverted to the N.J. Court Rule R. 4:30A looking for preclusionary effects, he was barred to do so by the New Jersey Court Rule mentioned, (untimely recourse of amendment), then unable to amend according to the R. 4:30A Counsel(s) reverted to the Fed. R. Civ. P. 15(a).

In a few words Counsel(s) reverted to the Rules according to their needs in detriment of Petitioner and the very same posture was predicated by the District and Appeals Courts.

In the case at bar Counsel(s) ended interposing a plain amendment under F.R.C.P. 15(d) circumventing the provisions of the Rule not without the complacency of the District and Appeals Courts.

The Brown Court, *supra* mimics Petitioner's case.

In any instance an amendment under Rule 15(d) must raise issues that arise after the initial pleadings are filed see

Glenside West Corp. v. Exxon Co. U.S.A., 761 F.Supp. 1118, 1134 (D.N.J. 1991) (citations omitted); see also Planned Parenthood of Southern Arizona v. Neely, 130 F.3d 400, 402 (9th Cir.1997).

Petitioner's citations (above),show it is not the Petitioner's case and an amendment under Rule 15(a) like the one allowed by the District Court and affirmed by the Court of Appeals was inappropriate, improcedent and biased.

II
THE COURT OF APPEAL IMPROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S § 1985 CLAIMS

Contentions by Respondent's Counsel(s) that Petitioner could have been raised 42 U.S.C. §§ 1985(2) and 1985(3) at the Essex County Superior Court Law Division are preposterous and laughable.

Petitioner introduced conclusive and substantial evidence at the District and Appeals Courts that linked Respondent with Petitioner's former employer's Counsels. Furthermore, in proceedings before the U.S.D.C., E.D.N.Y Role v. Eureka Lodge No. 434 et al. cv 00 4781 (DRH)/(ETB).

In addition, at a pre-motion conference held on January 28, 2002 at the EDNY Counsels for the Defendants in that action admitted they contacted Atco.

The issue is new or first pleaded only in the mind of Respondent's Counsel(s).

Petitioner contended that Respondent engaged in a conspiracy with former employer's Counsels directed to fabricate Petitioner's discharge and at the same time to defame Petitioner because he was attending federal proceedings in a civil rights lawsuit.
Respondent's Counsel(s)' litany of laments at p. 5, ¶ 2 of the Brief in Opposition tried in vain to obturate his Client's wound that continues bleeding reverting to the N.J. R. 4:30A, that is to say his client engagement in a class based invidious discriminatory animus raised by Petitioner in his claim before the Equal Employment Opportunity Commission and the District and Appeals Courts.

The Britt Court in Britt v. Suckle, 453 F.Supp. 987 (1978) at 992 set forth:

> "In the course of dismissing the complaint of an employee discharged from private employment solely because he had filed a voluntary petition of bankrupcy , the Court of Appeals held that in order to state a claim under § 1985(3), the alleged acts of the defendant must be illegal independently of 1985(3)."

Id. at 992:

> "Together, therefore, Griffing and McLellan provide the following standards to test the sufficiency of Plaintiff of Britt's allegations:
> (1) Statutory requirements:
> (a) Has Plaintiff alleged

that the defendant's actions are illegal independently of § 1985, as required by McLellan v. Mississipi Power & Ligh Company, *supra?*

(b) Has the plaintiff alleged "class based animus" required of § 1985(3) claimants by the Supreme Court in Griffing v. Brekenridge, *supra?*

(c) Constitutional Requirement: Does Congress have Constitutional authority to reach and prohibit the private conduct complained of in plaintiff's complaint?

In the case at bar there is a Petitioner that complained at the District and Appeals Courts that he was discriminated on the grounds of race, age and class-based animus. A Petitioner that complained and proved his discharge was fabricated in order to fabricate illegal evidence to be introduced against the Petitioner by former employer in another federal proceeding. A Petitioner that his right to work was deprived by Respondent. A Petitioner that complained that his discharge was in furtherance of conspiracy.

In Paton v. Laprade, 471 F.Supp. 166 (1971) it was said:

> "Again, I will point out that to allege "invidious", class

based discriminatory animus one need not use the word "invidious" class——based discrimination". (citatations omitted).

Reading Kyriazi v. Western Elec. Co. 461 F.Supp. 894 (1978) the Court reasoning was as follows:

"A unanimous Court of Appeals for this Circuit, sitting *in banc*, has recently held that 42 U.S.C. § 1985 (3) is available to an individual who claims to have been discriminated in retaliation for his advocacy of equal employment rights. Novotny v. Great American Federal Saving & Loan Assoc. et al., 584 F2d 1235 (3rd Cir. 1978) *(en banc)*.

Specifically, the Court held that (1) under the Supreme Court decision in Griffing v. Beckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), discrimination against woman [Hispanics] constitutes "class-based animus"; (2) that Title VII is a law which guarantees "equal privileges and immunities" within the meaning of § 1985(3); and (3) that a corporation can be deemed to have conspired with its own employees in violation of § 1985(3). The Court further noted that:

"[T]o deprive members of a class founded on gender [race] of equal protection or equal privileges and immunities without any justification is to act in an irrational and odious manner"

The last Petitioner's citation in parallel concomitance with Respondent's actions in collusion with its tool and die setter who had active participation in the job assigned to Petitioner on April 24, 2001 which Petitioner asserted was altered by Respondent in order to "fabricate" Petitioner's discharge alleging later "misconduct" on appeal actually before the N.J. DOL, Board of Review.

III
THE COURT OF APPEALS IMPROPERLY AFFIRMED DISMISSAL OF PETITIONER'S PRIVACY CLAIMS

Respondent admitted it disclosed Petitioner's personal file at the hearing held before the N.J. Department of Labor, Appeals Tribunal on September 10, 2001. The issue was pleaded by Petitioner at the District Court and Court of Appeals.

The individuals who were interested in the Petitioner's file were Counsels for Petitioner's former employer in the lawsuit at the U.S.D.C., E.D.N.Y.

See Allison v. City of Live Oak, 450 F.Supp. 200 (1978) at 204, citing Paul v. Davis, 424 U.S. 693, 702, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) where it was said that [R]eputation when coupled with loss of employment will invoke due process safeguards.

IV
THE COURT OF APPEALS IMPROPERLY DISMISSED PETITIONER'S ADEA CLAIM ON THE MERITS.

The U.S. Court of Appeals for the Third Circuit supported Petitioner's ADEA Claim. See Opinion at p. 6 an 7. At page 7, the Court of Appeals set forth Petitioner incurred in misconduct at the work place which barred his ADEA Claim.

Such an affirmation is baseless for the following reasons:

1. Respondent's claim was Petitioner mounted a piece backwards, since that Petitioner was negligent and engaged in misconduct
2. Petitioner appealed these charges before the N.J. DOL Board of Review where the appeal is waiting adjudication.

The Petitioner's rebuttal to the Court of Appeals is as follows:

A charge of negligence implies *per-se* the following components:

(a) **Duty:** Petitioner owed Respondent a legal duty of care.
During Petitioner's tenure at Atco there were no complaints documented regarding Petitioner's duty of care.
(b) **Breach of Duty:** Petitioner acted unreasonably.
Petitioner directed Atco's tool and die setter to call Petitioner to set the die, Atco's die setter destroyed Petitioner's instructions and proceeded by himself, Petitioner had lost control of his job.
(c) **Causation:** Petitioner's lack of care caused Atco harm.
Respondent never claimed Petitioner caused it any harm.
(d) **Damages:** Petitioner caused Atco economic losses, property damage, personal injury or psychological distress

In cross examination at the DOL Atco's vice president on September 10, 2001 testified it suffered no losses, no damages caused by Petitioner.

Summarizing Respondent's claim of Petitioner's misconduct was a *fraudulent representation* in which the Respondent's actions framed it in a conspiracy orchestrated by Respondent to discharge Petitioner. It was Respondent and its accomplice its tool and die setter who inverted purposely a die stripper.
The posture of the District Court and Court of Appeals in this regard needless to state, was a scandalous one. Same reasoning must be applied to the N.J. DOL Board of Review that beside of being scandalous was shameless since it still has pending an adjudication on the Petitioner's appeal, thus the Board of Review crossed the boundaries of the abuse of discretion into an area Petitioner reserves himself the right not to mention because of respect to the highest Court.
Respondent's citation of O'Connor v. Consolidated Coin Caterers Corp., U.S. 116 S.Ct. 1303 (1996) clears the way to adjudicate Petitioner's claim under the ADEA, since Petitioner's conduct during his tenure at Atco survived the tests set forth in the citation.

V
THE DISTRICT COURT DID ERR IN ITS APPLICATION OF THE ENTIRE CONTROVERSY DOCTRINE

In the State of New Jersey as well as in the rest of the States courts favor the principle of primary jurisdiction, meaning that like in the case at bar if there is an action pending adjudication before an administrative agency no court has jurisdiction to take over the matter before the agency rules in the subject matter before it. In the State of New Jersey a decision of the DOL's Board of Review must be appealed at the New Jersey Superior Court, Appellate Division.

In the case at hand Respondent's managing agent Martin Gorstein lied to the State Court acting Judge in two occasions namely, telling the Judge he was appealing a default judgment in which he made appearance and had active participation, and telling the Judge Petitioner was under the umbrella of an union "agreement" that acted in his facilities. See the District Court Opinion at p. 16 footnote 11.

It was stated in Garrow v. Elizabeth General Hospital and Dispensary, 401 A.2d 533, 79 N.J. 549 that "[i]nterruption of administrative process is not justifiable to any greater extent that interference with trial process by interlocutory appeal". Cf. Petitioner's appeal pending adjudication before the DOL, Board of Review.

Similarly, "[s]uperior Court may not usurp a function clearly delegated by the Legislature to an administrative agency". Frank v. Briel, 232 A.2d 455, 96 N.J. Super. 67. Cf. Petitioner's appeal pending adjudication before the DOL, Board of Review.

In general: MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F3d 1086, certiorari denied 117 S.Ct. 64, 519 U.S.

815, 136 L.Ed.2d 25 set forth :

"[In] contrast, when legislature provides agency with exclusive primary jurisdiction, it preempts courts' original jurisdiction over subject matter".

Cf. Petitioner's appeal pending adjudication before the DOL, Board of Review.

Petitioner's last citations tell the District Court and Court of Appeals that being Petitioner's case on appeal before the DOL Board of Review, the Essex County Superior Court Law Division had no jurisdiction to dispose or rule in the Petitioner's case.

For the foregoing reasons there are twofold arguments Petitioner can rise to erase Respondent's contentions regarding N.J. R. 4:30A. First, Respondent and his Counsel(s) lied in telling the Courts Petitioner was granted with a default judgment; Respondent Martin Gorstein made appearance to the hearing before the DOL Wage and Hour Compliance hearing held on July 19, 2001 via telephone. Second, primary jurisdiction tells the State Court it had no business with the Petitioner's case on appeal pending adjudication before the N.J. DOL, Board of Review.

VI
PETITIONER'S CLAIM THAT ATCO'S COUNSEL MADE "FALSE PLEADINGS" IS TRUE

Fed. R. Civ. P. 11(b) tells Counsel(s) for Respondent he/they had no latitude to plead frivolously. He/they

had to investigate thoroughly what his/their client did or did not do, said or did not say, ignorance of the client's conduct excuses no attorney. Therefore to thrust the idea into the Judges' minds that in the case at bar there was a default judgment in favor of the Petitioner when Respondent's managing agent Martin Gorstein made an appearance at the hearing via telephone and participated actively in it boxed Counsel(s) and his/their client(s) into the frame of perjury and obstruction of justice.

What the N.J. DOL Wage and Hour Compliance Division referee Sylvia Farley stated was that there was a default judgment in favor of the Petitioner. It is also perjury, subordination of perjury, obstruction of justice and official misconduct. It happens to be that Petitioner is suing ATCO PRODUCTS, INC., not the DOL's referee on behalf of the State of New Jersey. Petitioner had no business with the State of New Jersey. Respondent **"fabricated" a default judgment** with the DOL's referee in order to secure applicability of R. 4:30A at the N.J. Superior Court Law Division.

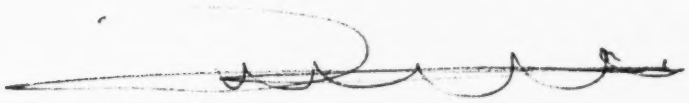
In doing so Respondent defeated the federal law abusing the state law. Respondent wrapped and kept in his pocket the New Jersey Department of Labor, Board of Review and the Wage Collection Division without any doubts.

CONCLUSION

For the foregoing reasons Petitioner, taking into consideration

Respondent's Counsels' conduct in this Court and the former ones as well as the actions of his/their client(s) asks respectfully this Court to enter judgment against Respondent(s) in the amount Petitioner asked in his Complaint or in the amount that this Court considers equitable and fair. Respondent and its Counsel(s) made a charade of the State of New Jersey and federal legal system.

Respectfully submitted



Eloy A. Role
Petitioner *pro-se*
22 Garrison Street
Newark, New Jersey
(973) 589-6414

(4)

Supreme Court, U.S.
FILED
APR 26 2004
OFFICE OF THE CLERK

No. 03-1084

IN THE

SUPREME COURT OF THE UNITED STATES

ELOY A. ROLE

Petitioner,

vs.

ATCO PRODUCTS INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

Eloy A. Role
Plaintiff *pro-se*
22 Garrison Street
Newark, NJ 07105
(862) 452-2003

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RELATED CASES AND PROCEEDINGS

There is an appeal by Petitioner waiting adjudication before the New Jersey Department of Labor, Board of Review, Docket No. 01-B-02766-000-XO.
The appeal relates to a charge of misconduct at the work place made by Respondent against Petitioner.

There is a Judicial Notice before this Court submitted by Petitioner according to the provisions of Federal Rule of Evidence, Rule 201 (d).

REASONS TO GRANT THE PETITION FOR REHEARING

Petitioner Eloy A. Role's Petition for Rehearing ("Petition") should be granted.
Petitioner's request to this Court of Judicial Notice in connection with the telephone logs that belong to the day 19 of July 2001, between 9:30 A.M. and 11:00 A.M. where Petitioner assisted to a hearing carried out before the New Jersey Department of labor Wage and Hour Compliance, in which together with the Petitioner it was assisted by Sylvia Farley, referee and Atco's president Martin Gorstein sets the foundation of Petitioner's Petition for a Writ of Certiorary in the sense that on the Petitioner's case there was not an Award by Default that can sustain later resort to preclusionary issues at the District

Court, Court of Appeals and the Supreme Court.
The foundation of the case has been rested in a false premise of a Default Judgment granted to the Petitioner by the New Jersey Department of Labor, Wage and Hour Compliance later on appealed by the Respondent before the Supreme Court of the State of New Jersey, Law Division.
The denial of Petitioner's Petition for Rehearing will enable Respondent and its Counsel to get along in the crimes of perjury and obstruction of justice.

I

RESPONDENT KNEW BEFOREHAND THE SOUNDNESS OF PETITIONER"S CASE AND HAD NO MEANS TO REVERT OTHER THAN TO THE DELINQUENT ONES TO SUSTAIN HIS CASE, NAMELY FABRICATION OF EVIDENCE PERJURY AND OBSTRUCTION OF JUSTICE.

It has been always understood —— the inference, indeed, is one of the simplest in human experience ——— that a party's *falsehood* or other *fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of true and merit. the inference thus does not necessarily apply to any specific fact in the cause, but operates indefinitely though strongly, against the whole mass of alleged facts constituting his cause, excerpts from Wigmore on

evidence, §278. (2) **Falsehood, fraud, fabrication and suppression of evidence, bribery spoliation and the like.** (citations omitted).
Further from the same citation:

> "(1) The use of fraudulent practice in a *separate litigation* has of itself no significance other than a reflection on the opponent's general character as an unscrupulous man . . . ".

In the case at hand the intervening circumstance of a substantial or controlling effect is the Respondent's evidence, that operated in detriment of the Petitioner. But such evidence is derivative as it was above already stated by Petitioner. The evidence introduced by Respondent broke the causal connection between a New Jersey Department of Labor referee's unlawful conduct that granted Petitioner a default judgment being Respondent appearance made via telephone. The evidence presented by Respondent as it was depicted by Petitioner in his Petition for a Writ of Certiorari is derivative since it was discovered by Respondent's Counsel himself, ***See*** Petitioner's Petition at Appendix A.7. Summarizing, it was Respondent's Counsel who stated that Atco ***"inadvertently failed to appear to the hearing".*** It was Respondent's Counsel not Petitioner who discovered illegally obtained evidence and brought over what later on resulted to be Petitioner's contentions of perjury, subordination of perjury and obstruction of justice on the side of Respondent and his Counsel. On the other hand when Petitioner reverted to the provisions of Federal Rule of

Evidence, Rule 201 (d), Petitioner proved his case beyond of the reasonable doubt. That in the Petitioner's case there was a default judgment is no more no less than evidence illegally obtained by Respondent, his Counsel and a referee of the New Jersey Department of Labor Wage and Hour Compliance Division, the whole Petitioner's case resumes in this spoliation.

So far Petitioner has pleaded in the context of **evidence** introduced by Respondent to sustain his case.
Focusing the matter from the point of what a default judgment means and considering what constitutes an appearance, [T]raditionally, to make an appearance one has to file documents or actually appear before a court. *See* Bass v. Hoagland (CA5 Tex) 172 F2d 205, cer den 388 US 816, 94 L Ed 494, 70 S Ct 57 (citations omitted). Precisely what happened in the Petitioner's case, Martin Gorstein, Atco's president made appearance via telephone to the hearing held at the New Jersey department of Labor Wage and Hour Compliance on July 19, 2001 in addition he faxed to the referee documents related to the payments made to Petitioner and this is the **Judicial Notice** that Petitioner filed with the Supreme Court on February 27, 2004 namely, the New Jersey Department of Labor, Wage and Hour Compliance Division's telephone records belonging to the 19th of July 2001.
An appearance within the meaning of the rule needed not to be a direct response to the complaint; there may be an appearance whenever a defendant takes, seeks or agrees to some step in the

proceedings that is beneficial to himself or herself or **detrimental** to the plaintiff. *See* Williams v. Jennette, 77 NC App 283, 385 SE2d 191. Thus, any conduct on the part of a defendant which indicates an intent to defend may constitute an appearance within the meaning of such a rule. *See* J. Slotnick Co. v. Clemco Industries (DC Mass) 127 FRD 435 (citations omitted).

CONCLUSION

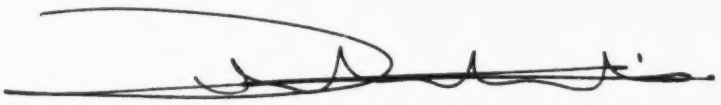
Petitioner has interposed in his Petition for Rehearing intervening circumstances of substantial and controlling effect on the grounds of his Petition such as illegally obtained and furnished evidence used in Petitioner's detriment to defeat his outstanding case still waiting for its day in court.
For the foregoing reasons Petitioner's Petition for a Rehearing should be granted.

Respectfully submitted

Eloy A. Role
Petitioner *pro-se*
22 Garrison Street
Newark, New Jersey
(862) 452-2003

CERTIFICATION

Petitioner certifies that his Petition for Rehearing obeys to the exigency that justice must be satisfied in his case. The Petition does not intend to delay any further proceedings if any. Nevertheless, if it were the case, Petitioner will afford them to the full extent of law.



Eloy A. Role
Petitioner *pro-se*